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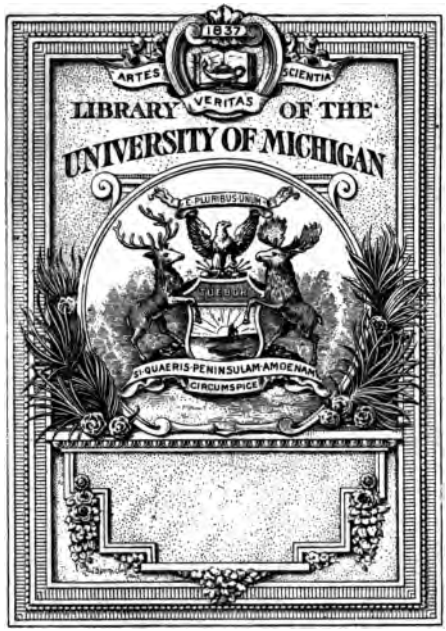
THE TWO HAGUE CONFERENCES

WILLIAM I. HULL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THE GIFT OF

THE TWO HAGUE CONFERENCES

AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW

BY

WILLIAM I. HULL, PH.D.

PROFESSOR OF HISTORY IN SWARTHMORE COLLEGE, MEMBER OF L'ASSOCIATION DES JOURNALISTES DE LA HAYE DE LA DEUXIÈME CONFÉRENCE DE LA PAIX

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TO

AMERICA'S FIRST DELEGATE

TO THE

SECOND PEACE CONFERENCE

AT THE HAGUE

THE HONORABLE JOSEPH HODGES CHOATE

JURIST, DIPLOMATIST, ORATOR, STATESMAN

WHOSE LONG CAREER OF SPLENDID SERVICE

TO HIS COUNTRY

HAS BEEN CROWNED BY

A NOBLE AND SUCCESSFUL STRUGGLE

IN BEHALF OF

PEACE AND ARBITRATION BETWEEN THE NATIONS

186621

PREFACE

THE National Educational Association, at its forty-fifth annual session in Los Angeles last summer, adopted a report presented by its Committee on Resolutions which contained the following section: —

"The teachers of the United States of America, assembled in the National Educational Association at Los Angeles, California, view with pleasure and satisfaction the conditions which have brought about the second Hague Conference. We believe that the forces of the world should be organized and operated in the interests of peace and not of war; we believe that the material, commercial, and social interests of the people of the United States and of the whole world demand that the energies of the governments and of the people be relieved of the burdens of providing at enormous expense the armaments suggested by the competitive desire for supremacy in war; we further believe that the fear of war and the possibility of war would alike decline if the governments were to rely more upon the sentiment of the people and less upon the strength of their armies and navies.

"We urge upon our representatives at the second Hague Conference to use their influence to widen the scope and increase the power of the Hague tribunal. While disclaiming any desire to suggest a programme or to urge specific action, we do urge our representatives to secure the most favorable action possible upon international arbitration, the limitation of armaments, the protection of private property at sea, and the investigation of international disputes by an impartial commission before the declaration of hostilities.

"We recommend to the teachers that the work of the Hague Conferences and of the peace associations be studied carefully, and the results given proper consideration in the work of instruction."

This message from the ten thousand teachers present at Los Angeles to their more than half million colleagues

in the United States was the culmination of a movement which included, among other noteworthy facts, resolutions similar in tenor passed by the American Institute of Instruction at its meeting in Montreal and by the National Association of School Superintendents at its meeting in Chicago. It was brought to the author's attention while he was in The Hague endeavoring to fulfill the mission of an American journalistic representative at the second Peace Conference; and so desirable did it seem that the Association's recommendation to its members should be acted upon that this book was written in the hope that it might prove of service to them in carrying it out.

The arrangement of topics is such that either a consecutive account of each conference may be secured, or a comparative study of the discussion and action upon each topic by the two conferences may be made.

The participation of the delegations from the United States in the work of each conference has been made especially prominent. But both commendation and condemnation, in this as in other particulars, have been carefully avoided. For the object sought by the author was to present a true and impartial — a *historical* — record, and not to enter upon the field of partisan argument or theoretical contention.

As to the proportionate amount of space devoted to the various topics, it may be said that some of them which have been presented in some detail, although but little or no important action was taken upon them by the two conferences, are none the less prominent in the public thought and are destined to play an important rôle in future conferences.

The sources of information for the two conferences

are few in number, but are both official and satisfactory. For the first conference, the official record, entitled "Conférence Internationale de la Paix," has been published in a large quarto volume of six hundred and twenty pages by the Netherlands minister of foreign affairs. It contains the minutes of all the meetings of the conference, its commissions and subcommissions; the admirable reports upon the discussions of the subcommissions and commissions; and the official text of the conventions, declarations, and resolutions adopted by the conference. The "Actes et Documents relatifs au Programme de la Conférence de la Paix de la Haye 1899," also published by order of the Netherlands government, is a valuable collection of materials upon which the work of the conference was based. "The Peace Conference at The Hague," by F. W. Holls, a member of the United States delegation to the conference, is authoritative and interesting.

The official record of the second conference, identical in character with that of the first, and of far larger volume, was printed from day to day during the conference, but has not yet been published. Through the courtesy of the Netherlands minister of foreign affairs the author was able to procure a complete set of this record and to base his account of the conference upon it. Almost all of the multitude of documents and comptes-rendus of the conference were published in the *Courrier de la Conférence*, which appeared daily during the sessions of the conference, under the editorship of the able and distinguished journalist, Mr. William T. Stead. In common with all the readers of the *Courrier*, the author of this book owes a large debt of gratitude to Mr. Stead for the enterprise and public spirit shown by him in inform-

ing the public so fully of the work of the conference, and in stimulating and informing the members of the conference as well.

All of the proceedings of the two conferences were conducted in the French language, and since the speeches had first to be translated from the speakers' native languages into French and then, for the purpose of this book, into English, it can not be hoped that their original flavor and force have been fully retained. But it is to be hoped that enough has been retained to impress readers with the great and genuine eloquence of many of the speeches, and to illuminate the serious record of these two unique and epoch-making events in the world's history.

VILLA BOSCH HOEK
THE HAGUE

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THE TWO HAGUE CONFERENCES

I. ORIGIN

a. THE CONFERENCE OF 1899

THE beginning of the Nineteenth Century found Europe struggling in the throes of the great Napoleonic Wars; its end saw the meeting of the first Peace Conference at The Hague. Our own country was drawn into the Napoleonic struggle and fought the War of 1812. At the end of that war, when the civilized world lay breathless and ashamed of its quarter century of fighting, the first peace society was organized in New York City. Other peace societies were slowly formed, and the next generation held a series of international peace congresses in the capitals of Europe.[1] But then ensued another generation of warfare, and it was not till 1889 that the international peace congresses again assembled. Sixteen of these congresses have since that time been held in the large cities of both the Old World and the New,[2] and have done a very great deal to prepare the way for the conferences at the Hague.

The marvelous growth of commerce in the Nineteenth

[1] In London, 1843; Brussels, 1848; Paris, 1849; Frankfort, 1850; London, 1851.

[2] Paris, London, Rome, Berne, Chicago (in 1893), Antwerp, Buda-Pesth, Hamburg, Paris, Glasgow, Monaco, Rouen, Boston (in 1904), Lucerne, Milan, and Munich.

Century, made possible by steam navigation and the electric telegraph and cable; the great increase of travel and emigration from one country to another; the steady growth of education, the steady decline of what Robert Burns called "the inhumanity of man," and the steady improvement in the methods and aims of governments, — have all aided greatly in the growth of genuine peace sentiment, in the organization of peace societies, and in the holding of national and international peace congresses.

But the immediate cause of the holding of the first Hague Conference was the action of Nicholas II, Czar of Russia. It has seemed very remarkable to the rest of the world, and even to many Russians themselves, that such an impulse toward international peace should have come from the world's largest military power, the one, too, which can increase its military strength unrestricted by constitutional and parliamentary checks. But at many times in history "good things have come out of Nazareth"; and there is no sufficient reason to doubt that the present Czar is entirely sincere in his desire to promote the world's peace, and to diminish the burden of taxation for military and naval expenditures which presses down with enormously increasing weight upon the shoulders of the people.

This desire of the Czar found practical expression when General Kuropatkin of the Russian army, M. Witte, Russia's finance minister, and Count Mouravieff, the Russian minister of foreign affairs, were endeavoring in the summer of 1898 to avoid the necessity of replacing an antiquated kind of artillery by a new and expensive one. The discussion of this question gave rise to the discussion of armaments in general, and by the Czar's orders Count Mouravieff prepared the famous "Rescript" of August 24

(Russian style, August 12), 1898. This was a written statement as to the great increase in armaments in recent years, their evil results, and the desirability of checking their further growth; and it proposed that the governments should send representatives to a conference which should "occupy itself with this grave problem."

A copy of this statement and proposal was presented by Count Mouravieff to each of the ambassadors and ministers from other countries to Russia at their weekly reception at the Foreign Office in St. Petersburg, and was by them sent to their various governments. Some of these governments, among them that of the United States, promptly accepted the Czar's proposal, but others were indifferent to its object or skeptical as to its result, and it was not until October 24, 1898, that the last acceptance was received. Two months more elapsed, during which time "war and rumors of war" almost discouraged the Russian government in its task; but the sympathy of the public in every Western country had been aroused, and on January 11, 1899 (Russian style, December 30, 1898), Count Mouravieff issued a second rescript or circular, suggesting a programme of subjects to be discussed by the conference; and, finally, after more correspondence between the governments, an invitation was sent out on April 7 for the conference to assemble May 18 at The Hague.

b. THE CONFERENCE OF 1907

The first conference in 1899 had met with such great success that it seemed most desirable that another conference should speedily be held to accomplish the work which the first one had left undone. But two terrible wars, the

Anglo-Boer and the Russo-Japanese, burst upon the world and shattered for a time all hope of another Peace Conference between the nations. The first conference, however, had shown what could be done, and peace men everywhere were determined that another should be called at the first opportunity. In September, 1904, when the Russo-Japanese War was running its course, the Interparliamentary Union was holding its annual meeting in the city of St. Louis, Missouri. This Union is a very influential association, its members being the delegates elected by the people to represent them in the Congress of the United States, the Parliament of Great Britain and Ireland, in all the congresses of the American Republics and (with two exceptions) in all the parliaments of Europe. Its object is to promote the spirit of peace and friendliness among all the lawmakers of the world, and, by holding its meetings in each of the countries in turn, to arouse among the peoples themselves a genuine love of international peace. The meeting which it held in 1896 in Buda-Pesth, Hungary, so greatly impressed one of the Czar's ministers, M. Basily, that he at once began to advocate in Russia the reduction of armaments. In this and in various other ways, the Interparliamentary Union helped greatly, though indirectly, to bring about the meeting of the first conference at The Hague. The calling together of the second conference was due directly to its initiative. At its session in St. Louis, in 1904, Mr. Richard Bartholdt, Member of Congress from Missouri and founder of the American Group of the Interparliamentary Union, proposed a resolution requesting the governments of all the world to send delegates to a second international conference. The Union adopted this resolution unanimously, and sent a deputation

of two hundred of its members to Washington to request President Roosevelt to convoke the conference.

The President received the deputation most cordially and promised to comply with their request. In October of 1904, Secretary of State John Hay, by the President's orders, published a circular discussing the work of the proposed conference and suggesting The Hague as its place of meeting. But the Russo-Japanese War was still raging, and the great powers did not think that the right time for holding the conference had arrived. When the war had been ended by the Treaty of Portsmouth, New Hampshire, in September, 1905, — a treaty concluded largely through President Roosevelt's aid, — the Czar instructed his ambassador in Washington to communicate to the President the Czar's desire to convoke a second conference at The Hague, and to inquire if the President would be willing to relinquish the honor of calling the second one to the Czar, who had summoned the first. President Roosevelt expressed himself as delighted with this arrangement, and after the necessary diplomatic correspondence the Russian government issued its invitation to the nations and its programme of topics. This was in April, 1906; but as the American Republics had decided to hold the third of their Pan-American Conferences at Rio Janeiro in that year, the Hague Conference was postponed until 1907. In the spring of this year, the Russian government renewed its invitation, and it was finally decided that the conference should assemble on the fifteenth of June at The Hague.

II. PLACE OF MEETING

a. THE CONFERENCE OF 1899

In Count Mouravieff's second circular of January 11, 1899 (Russian style, December 30, 1898), it was stated that the Czar considered it "advisable that the conference should not sit in the capital of one of the Great Powers, where so many political interests are centered, as this might impede the progress of a work in which all the countries of the universe are equally interested." One month later the invited governments were informed that the Queen of the Netherlands had expressed her assent to the conference being held in her residence city, The Hague.[1] And it was, accordingly, the Netherlands minister of foreign affairs who, accepting Russia's list of invited guests, extended on April 7, 1899, a formal invitation to the governments to send their delegates to meet at The Hague.

For several reasons, the choice of this city as the meeting place of the conference was a happy one. On the eastern coast of the Atlantic Ocean, it was readily accessible to the twenty European countries represented in the conference; while it could be reached from the four Asiatic and two American countries without the necessity of long land journeys being taken after the ocean voyages were

[1] The Hague, strictly speaking, is not the capital of the Kingdom of the Netherlands, although it is the seat of the national legislature, judiciary and executive; but as the Queen resides here during most of the year, it is called the residence city, "De Residentie."

accomplished. As its country is one of the smallest, in population and area, it was free from the political objections referred to in the Russian circular; while its many comforts and conveniences of daily life, its cleanliness, good government, and great beauty made it peculiarly fitted for the accommodation of strangers from many lands. The people of the Netherlands have rightly judged, as their minister of foreign affairs said in his closing speech to the conference, that its sessions will remain forever a bright spot in the history of their country, because they are firmly convinced that it opened a new era in the history of international relations between civilized peoples.

The Queen, to mark her appreciation of the honor conferred upon her country and of the historic significance of the conference, placed at its disposal the most beautiful historical building in the land. This was the far-famed House in the Woods ("Huis ten Bosch") formerly the summer residence of the royal family, situated about one mile from the city in the midst of a park whose noble trees and vistas have no superior in Europe. Here the conference held its sessions in the ballroom, known as the Oranje Zaal, and decorated with mural paintings by some of Holland's best artists. One of these paintings was considered — like the rising sun painted behind George Washington's chair in Independence Hall when the United States Constitution was adopted — to be of good omen; it was an allegorical representation of the Peace of Westphalia, which put an end to the terrible Thirty Years' War, and pictured Peace entering the Oranje Zaal for the purpose of closing the doors of the Temple of Janus, whence issue, according to the old Roman legend, the "dogs of war."

Some rooms adjoining the Oranje Zaal were also thrown open for the use of the conference committees, and in one of them the Netherlands government served lunch daily for the members. The members lived, of course, in hotels in The Hague and went out to the House in the Woods by carriage, by tram, or on foot.

b. THE CONFERENCE OF 1907

When Secretary Hay published President Roosevelt's call for a second conference, in October, 1904, he spoke of the President's desire that the conference should meet at The Hague, and of his "desire and hope that remembrances of The Hague as the cradle of the beneficent work commenced in 1899 may be revived by the fact that a new conference will meet in that historic city." Thus, not only for the sake of The Hague, or of the conference and its members, but in order to strengthen the work of the first conference, it seemed natural and right that the second should meet in the same city. The Czar shared this opinion, and the Queen and people of the Netherlands were more than willing to be the hosts of the conference again.

But as the delegates to the second conference were to be more than twice as many as attended the first, the Oranje Zaal in the House in the Woods would be too small for their meetings, and it might become inconvenient for so many to make the journey to it. For these reasons the Netherlands government had fitted up for the use of the second conference an old historic building in the heart of the city. This was the Hall of the Knights ("De Ridderzaal"), a thirteenth century castle, built for the Counts of

Holland, who used it chiefly during their hunting expeditions to the North Sea marshes. Its great banqueting room, where the counts made merry with their knights, was restored in 1900, and has been used annually since 1902 for the joint meetings of the Upper and Lower Houses which form the States General of the Netherlands. The conference used this room for its large meetings, and its various committees found smaller rooms near by. The Hall stands in the "Binnenhof," the old fortress of the city, and in and around it have occurred many historic events in connection with the County of Holland and the Republic and Kingdom of the Netherlands.

III. MEMBERS

a. THE CONFERENCE OF 1899

The question as to which governments should be invited to send representatives to the conference of the nations had considerable political importance in several cases, for in answering it there was danger that an invitation to some small powers which claimed complete sovereignty for themselves would irreparably offend the great powers which claimed rights of sovereignty over them.

The Russian government answered this delicate question by determining to invite only those governments that were represented by diplomatic agents at St. Petersburg. This general rule was not observed, however, in some notable instances, both in extending the invitation to some powers not represented at the Russian Court (for example, Luxemburg, Montenegro, and Siam), and in withholding it from some others which were so represented (for example, the South African Republic). The Russian government did not offer any official statement of the reasons for its inclusions and exclusions; but it is generally admitted that it exercised its discretion in extending the invitations in a wise and clever manner.

Twenty-six of the world's fifty-nine governments claiming independent sovereignty were represented at the conference; twenty of these were European, four were Asiatic, and two were American. The three European powers

not represented, or invited, were Monaco (a principality, with eight square miles of territory and about 15,000 inhabitants), the Republic of San Marino (with thirty-eight square miles of territory and 11,000 inhabitants), and the Roman Papacy. The Queen of the Netherlands informed the Pope of the proposed conference, and asked for it his sympathy and moral support; and Pope Leo XIII replied, expressing his "keen sympathy for its eminently moral and beneficent object." The independent Principality of Montenegro, although invited to send delegates of its own, requested the representatives of Russia to act for it. The Principality of Bulgaria, although it is tributary to the Sultan of Turkey, received Turkey's sanction to send delegates of its own; but these delegates were required to sit behind the Sultan's delegates and inscribe their names in all official documents after the names of his delegates.

Of Asia's nine powers claiming independent sovereignty, China, Japan, Persia, and Siam were represented; the other five, as well as the great populations under the domination of some other power, were not invited.

Africa sent no representatives from her six powers claiming sovereignty, since, for various reasons, none of them were invited to do so. This omission was widely commented upon in the case of the South African Republic and the Orange Free State, both of which have since been incorporated in the British Empire.

Of America's twenty-one republics, only two, the United States and Mexico, sent representatives. Two of the others were invited to do so; but Brazil replied that it had no permanent army worth mentioning; and it was not publicly stated which of the other republics was invited, or why it declined to be represented.

Although less than half of the world's governments sent delegates to the conference, those that did so controlled the resources and presided over the political destinies of three fourths of the human race. Hence it was rightly called the nearest approach in the world's history to the Parliament of Man, the Federation of the World.

The delegates numbered just one hundred, some of these being technical or scientific experts, while the majority were diplomatists, statesmen, and publicists. From one to eight delegates were sent by each government, but each delegation, large or small, and representing a weak or a strong power, had only one vote. (This recognition of the autonomy and equality of states is an interesting illustration of state sovereignty and international democracy.)

As in all international assemblies, however, in spite of the theory of international equality, the influence of the great powers and of great personalities was a striking fact. In arranging the seats of the delegates, the alphabetical list of the countries, according to their names in the French language, was followed; and this arrangement brought all of the great powers to the front, — the Russians, as initiators of the conference, being seated around the president, who was also a Russian. The French name for the United States (*Etats Unis d'Amérique*) would have placed its representatives seventh on the list; but either because this arrangement would have seated its delegates next to those of Spain (*Espagne*), with whom it had recently been at war, or because of its commanding position in the New World, it was classed as *Amérique*, second on the list, and just after Germany (*Allemagne*). The United States and Great Britain did a great deal of work together in the conference; and the dual alliance of France and Russia, and the triple

alliance of Germany, Austria, and Italy, also made their influence felt in various phases of its work.

Among the individuals who were most prominent and influential in the conference may be mentioned: Andrew D. White and Frederick W. Holls, of the United States; Sir Julian Pauncefote, of Great Britain; Leon Bourgeois and Baron d'Estournelles de Constant, of France; Count Münster and Professor Zorn, of Germany; Auguste Beernaert and Chevalier Descamps, of Belgium; Count Nigra, of Italy; Professor de Martens and Baron de Staal, of Russia; A. P. C. van Karnebeek and T. M. C. Asser, of the Netherlands; and M. Eyschen, of Luxemburg. It may seem invidious to mention these fifteen individuals in a body of one hundred, so many more of whom were men of remarkable abilities; but circumstances, as well as abilities, united to give to these men the opportunity of exerting a definite and powerful influence on the conference, as may be seen from the account of its work.

b. THE CONFERENCE OF 1907

The absence, from the first conference, of delegates from the republics of South and Central America was regretted for various reasons by the United States and Mexico, upon whom devolved the duty of defending the peculiar interests of the New World; while the Latin Republics themselves soon found that questions in which they were gravely interested had been discussed at the first conference, and were to be discussed at the second. Partly because of these facts, and partly in recognition of President Roosevelt's aid in convoking the second conference, as well as because of the desirability that all independent nations

should subscribe to the work of 1899 and participate in the discussions of 1907, it was decided that to this conference all of the Latin Republics should be invited. This increased the American governments at the conference from two to nineteen. The other two, Honduras and Costa Rica, were also invited, and they appointed delegates who came to The Hague but did not take their seats. Two seats were reserved for the delegates from Honduras, but apparently because of the difficulty of deciding at the time that the appointees represented a *de facto* government, its delegates were not seated; while Costa Rica was not named on the official list of the countries represented, and no seat was reserved for its delegate.

The large addition to the American ranks had very important consequences, as will be seen, to the work of the second conference; and at its second session the delegates of the Latin Republics of the New World gave in their adhesion to the acts of the Conference of 1899.

Africa remained unrepresented, as before; while two of its governments, claiming independent sovereignty in 1899, had been replaced by that of Great Britain.

Asia was represented by the four governments of 1899; and a determined but unsuccessful effort for admission on the part of Corea was followed by its practical absorption by Japan.

The twenty governments of Europe were represented as before, with the addition of Norway, which had recently separated wholly from Sweden. Montenegro followed its precedent of 1899 by requesting Russia's representatives to act for it; but Bulgaria, again permitted by Turkey to send delegates, was ranked in seats and signatures independently of her suzerain.

It is seen, then, that of the world's fifty-seven powers claiming sovereignty in 1907, forty-four sent delegates to the conference; and that a still larger proportion of its peoples and resources were represented in it. Thus it was believed to mark another long stride towards the "Parliament of Man" dreamed of by the poets and prophesied by the seers.

With the number of countries represented nearly doubled, the number of delegates was more than doubled, being in the second conference two hundred and fifty-six. The number sent by each country varied from one to fifteen, but as before each delegation had only one vote. The seats were again arranged in alphabetical order according to the French names of the countries, and the United States was again ranked as *Amérique*. The grouping of the seats was different in several of the plenary sessions, but each time the alphabet favored the large powers by bringing their delegates to the front. And it was observed with interest that at the first and second plenary sessions the Americans and Spaniards, and the Russians and Japanese, sat side by side with only a narrow aisle between. At the third session the Americans and Germans sat on either side of the president, facing the other delegates; and at the later sessions the Germans, Americans, and British occupied the first rows of seats, — still in alphabetical order.

Among the leaders of the conference should be mentioned first Joseph H. Choate and General Horace Porter, of the United States; Baron Marschall von Bieberstein, of Germany; Sir Edward Fry and Captain C. L. Ottley, of Great Britain; Dr. Drago, of Argentina; M. Beernaert, of Belgium; Ruy Barbosa, of Brazil; Leon Bourgeois, Baron d'Estournelles de Constant and Professor Renault,

of France; Count Tornielli, of Italy; Francis Hagerup, of Norway; General den Beer Poortugael, of Holland; Marquis de Soveral, of Portugal; and Professor de Martens and M. Nelidow, of Russia.[1]

[1] These names are mentioned, not in order of importance, but in the alphabetical order of the countries represented.

IV. FESTIVITIES AND CEREMONIES

a. THE CONFERENCE OF 1899

The importance of hospitality in private and public life is a matter of common observation and of historic record. It played its part, too, in the conferences at The Hague. One of the delegates to the first conference remarked:

"Do you want to know a secret by means of which we triumphed over many difficulties during this conference? In our delegation, when we foresaw some cloud on the horizon, we invited to dinner those whom we thought most likely to be opposed to what we considered the best solution of the problem, and, in friendly talks around the table, difficulties were smoothed away which would have been insurmountable if their disposition had been left to a committee or a commission."

This secret was shared by most of the delegations, and dinners and lunches were given and received, not only for the purpose of smoothing away the difficulties of the conference itself, but to create or to strengthen the diplomatic ties of international alliances.

The official society of The Hague vied with the visiting strangers' hospitality in giving receptions, balls, and banquets. The city of The Hague gave a concert; Haarlem, a great floral and equestrian fête; Scheveningen, a concert and ball; the government of the Netherlands, besides serving a daily luncheon to the delegates at the House in the Woods, gave in their honor a musical and artistic festival,

the climax of which was a series of national dances illustrating the costumes of the various provinces; the Queen and Queen Mother gave a *soirée* at the Palace in The Hague and a state dinner at the Palace in Amsterdam.

The most interesting, historically, of the unofficial ceremonies of the conference was the celebration of the Fourth of July by the American delegates, who invited the members of the conference to be their guests on that occasion at Delft. Here, in the Great Church, Ambassador White, in the name of the United States, placed a silver wreath upon the tomb of Hugo Grotius, the founder of International Law, and made a noteworthy address. Other short but impressive addresses were made by Seth Low, of New York, and by eminent jurists of the Netherlands; and the ceremonies in the church were followed by a luncheon given by the American delegates to their three hundred and thirty guests in the Town Hall.

b. THE CONFERENCE OF 1907

The second conference attached quite as much importance as the first to social amenities. The South American delegations, in particular, vied with each other, and with certain delegations of the Old World, in proffering hospitality. One of the most magnificent and largest of all the receptions was given by the American minister and delegate, Dr. David J. Hill, in the Hotel des Indes, on the Fourth of July. The Netherlands government, although it did not attempt to invite the many delegates to a daily luncheon as in 1899, did all that it could to promote the comfort and pleasure of its guests during their prolonged stay throughout an exceptionally cool summer.

The Queen received all the delegates at the Palace in The Hague, and gave a state dinner to the delegates in chief at the Palace in Amsterdam. The city of The Hague gave a musical and artistic festival, whose chief feature was the national dances in provincial costumes. The Netherlands government gave an excursion on the New Waterway, the new and superb entrance from the North Sea to Rotterdam; in the course of this excursion the small towns along the way were decorated with the flags of all nations and received the guests with speeches from their burgomasters, the music of orchestras, and the singing of national songs by hundreds of school children; an international yacht race was held on the Maas River as the excursion boats steamed along; all the many large ship canals of Rotterdam were traversed; and a garden party was given at the end of the trip in the park in Rotterdam.

The most imposing and important public ceremony of the second conference was the laying of the "first stone" of the Palace of Peace. This occurred on the afternoon of 1907 July 30, in the presence of all the delegates and many other invited guests. Andrew Carnegie, a distinguished citizen of the United States, had presented to the Netherlands government the sum of one million and a quarter of dollars for the erection of a building suitable for the sessions and for the library of the International Court of Arbitration created by the first conference; and to this building popular fancy and the logic of events have already affixed the name of the Palace of Peace. The Netherlands government provided a fine site for the building at the point where The Hague is entered by the great tree-lined avenue known as the Old Scheveningen Way; and the eminent Netherlands statesman, Jonkheer van Karnebeek, chairman of the building

committee, delivered the chief address when the "first stone" was laid. The president of the conference, M. Nelidow, of Russia, performed the ceremony of laying the stone and also delivered a significant address. At one of the last plenary sessions of the conference, Baron d'Estournelles, of France, offered a resolution expressive of the desire "that each government represented at The Hague should contribute to the erection of the Peace Palace by sending, after consultation with the architect, materials of construction and ornamentation, representing the purest example of its national production, so that this Palace, an expression of universal good will and hope, may be built of the very substance of all countries." The Baron presented this resolution in a short but eloquent speech, which was greeted with great applause, and the resolution was adopted by acclamation.

V. ORGANIZED PUBLIC OPINION

a. THE CONFERENCE OF 1899

A programme of topics for discussion had been agreed upon by the governments before the conference met, and each delegation, of course, had its specific instructions from its own government. But, although a strenuous effort was made at first to keep all reports of the debates secret from the public, it was inevitable that enterprising journalists should discover what was being said and done and should publish the facts broadcast in the daily and weekly newspapers of the world; and it was equally inevitable that the great, incalculable force of the world's public opinion should beat upon the conferences and their members, and make its influence directly and indirectly felt.

The first conference, at its first session, passed a resolution declaring all meetings of the conference and its committees to be absolutely secret; and so far was this carried that a very few invited guests were admitted as spectators only on the opening and closing days, while during all the other sessions of both conference and committees all outsiders of every kind were excluded, and visitors were not even permitted to inspect the Palace. Not only were outsiders thus debarred from securing and publishing any account of the proceedings, but the conference itself made inadequate provision for recording its transactions. There was not a single stenographer among its

secretaries, and the minutes of each meeting were not verbatim reports, nor were any copies of them, nor any documents connected with the proceedings, permitted to be published. This secrecy was defended by some of the leaders of the conference on the ground that only thus could complete freedom of speech and deliberation be secured. On the other hand, the journalists denounced it as an absurd superstition, as an anachronism dating from the time when the only international conferences were gatherings of royal conspirators plotting the theft of their neighbors' lands; and they urged England's and America's example to show that only where complete publicity accompanies public action can genuine freedom of speech or responsibility exist. Acting on this belief, the journalists present at The Hague brought every possible pressure to bear upon individual delegates and procured in this way information that was meager, half true, or wholly false. One of them caricatured so unmercifully an alleged speech of Dr. Zorn, one of the German delegates, that the German government, following Bismarck's precedent at the Congress of Berlin in 1878, made a formal demand that some official account of the proceedings should be given to the press. Accordingly, at its second session, May 20, the conference decided, in the words of its president, "to take into consideration the legitimate curiosity of the public attentive to our labors," and authorized the president to communicate through the secretaries to the press a summary of the proceedings of each session. These brief summaries were largely supplemented by voluntary statements from individual delegates, most of whom came to see that secrecy was impossible and publicity desirable. Indeed, the majority of the delegates themselves – and this was true

especially of the second conference — learned of the work of the small committees only from the information secured through secret channels by two or three enterprising journalists. And the great world outside would have known but little and probably cared far less than it did for the work of the conference, if it had succeeded in hiding its light under a bushel in the way in which it at first tried to do. While the conference itself would very probably have failed in its most important work, the promotion of arbitration, had it not been fortified at a critical time by the power of public opinion.

The agencies through which this power of public opinion was organized and brought to bear upon the conferences were memorials and deputations in large numbers and of many kinds. Cablegrams, letters, addresses, even pamphlets and books, were showered upon the conference, or upon one or other of its delegations, by individuals, societies and churches. These contained sympathy, advice, exhortation, command; and a few of them outlined definite plans for an arbitration tribunal which were of great service to the committee in charge of that subject. The chief value of these multitudinous communications, however, was to convince the conference that the peoples of the civilized world hoped and demanded that the conference should accomplish something definite and fruitful for the preservation of the world's peace.

The governments behind the conference came to share this conviction, and it is related by Ambassador White that the German Chancellor, Von Hohenlohe, was largely influenced by evidences [1] of the popular demand for an

[1] Dr. White mentions particularly the call of the Protestant Episcopal Bishop of Texas for prayers throughout the State in its behalf.

arbitration court to change the German delegation's instructions in regard to it from opposition to support.

In addition to "the written word" came many "living epistles" in the form of delegates or deputations who sought to address the conference or its various delegations on a great variety of subjects. Especially prominent and persistent among these were the representatives of the world's weaker nationalities, such as the Poles, Finns, Armenians, Macedonians, and Young Turks, who appealed to the conference to aid them in realizing their aspirations towards independence or to alleviate the miseries of their daily life. The argument which they brought to the Peace Conference was that permanent peace could be secured for the world only after justice had been procured for them. But however much the delegates to the conference might sympathize with such aspirations and miseries, the conference itself rightly decided that it had no jurisdiction over such matters. Hence, these deputations, disappointed and embittered, returned to their countries, there to spread the belief that the conference was a mockery and a farce, and to proceed with increased vigor to further the gospel of revolution and violence as the only hope of their salvation.

b. THE CONFERENCE OF 1907

Baroness von Suttner, the author of "Lay down your Arms," who was present at The Hague during the sessions of both conferences, engaged in writing of them for the public press, said of the members of the second conference:

"That which impresses me most is their respectful obedience to the desires of public opinion. If they oppose a reform, it is only because they are persuaded that public opinion is indifferent to it. If public

opinion should express itself with appropriate vigor, there is nothing the conference would not try to do. The fact is that the delegates are only the hands on a watch; their movements are governed by a great invisible spring. This spring is public opinion: not the private opinion of individuals; but *public* opinion — opinion expressed, organized, made palpable and even disagreeable to those who oppose it. That is the master, and even the god, of the conference."

Within the conference, too, this thought was expressed many times, perhaps most impressively by M. Beernaert, of Belgium, one of the most influential leaders in both conferences. In one of his addresses, M. Beernaert reminded his colleagues of their responsibility to public opinion, "that redoubtable sovereign," and said: "Public opinion is listening to and watching us; and to-day there is no assembly which must not sit with windows opened, listening to the voices from outside."

Animated by this belief, the second conference made but feeble and unsuccessful efforts to keep its proceedings secret. From one to two hundred invited guests were present at all of the plenary sessions; and although the meetings of its commissions were attended by none but members, the conference at its second session authorized the president and secretariat to publish information as to their work. This was accordingly done by the general secretary of the editing committee after every meeting of a commission or subcommission; and as at the first conference, no sooner were documents printed and in the hands of the delegates than they found their way to the daily press. At one of the plenary sessions, about one month after the conference commenced, the president said that a great power had complained of the publication of certain documents, and urged the delegates to keep these

secret; but the delegates did not respond completely to the president's plea and continued to give the documents to newspaper men as before.

The journalists at The Hague, proudly calling themselves "the ambassadors of the peoples" and "the fourth estate of the conference," did their best to learn the facts and to publish them truthfully as well as fully. But it must be confessed that many of the newspapers unrepresented at The Hague treated the second conference with even more ridicule and misrepresentation than they had done the first. The great majority of the newspapers and journals, however, as well as the world of public opinion were profoundly interested in and hopeful of the conference, and did their best to help it to arrive at beneficial results. Thousands of addresses and dozens of deputations evinced this interest and sought to realize the hopes which they expressed.

Among the most significant deputations and addresses may be mentioned those from: the International Council of Women, bearing the signatures of two million women living in twenty different countries; the Universal Alliance of Women for Peace by Education, representing nearly five million women of all civilized lands; English, American, and European churches, bearing the signatures of sixty archbishops and bishops and more than a hundred official representatives of non-episcopal churches; the International Federation of Students; the students of the Netherlands, — a branch of "Corda Fratres"; twenty-three colleges in the Central West of the United States, representing twenty-seven thousand professors and students; a petition for arbitration bearing two and a quarter million signatures, collected through the efforts of a single

Boston teacher and presented by her to the president of the conference on the Fourth of July; two thousand students of the Summer School at Knoxville, Tennessee, who also cabled their address to the conference on the Fourth of July; fifteen thousand citizens of Sweden, meeting separately in their various localities; the International Bureau of Peace, with its headquarters in Berne; many peace societies of the United States, Great Britain, France, Portugal, San Marino, and Japan; and two very noteworthy peace congresses, — that of April, 1907, in New York City, and that of September, in Munich, Germany.

The Interparliamentary Union was an effective factor in the second conference as in the first, through the presence and influence of presidents and members of its various Groups, and especially through the plan of obligatory arbitration which it prepared, which the Marquis de Soveral, of Portugal, presented to the conference, and which became the basis of the agreement adopted by the conference for obligatory arbitration.

The "oppressed nationalities" of the world made their voices heard at the second conference also, and with the same result as at the first, a reply, namely, that the conference had no jurisdiction over the internal affairs of the various governments. Among these deputations and addresses were those from the Albanians, Armenians, Bosnians, Coreans, Georgians, and Herzegovinians; and individual appeals were received from Boers, Egyptians, and Irishmen. The Zionists', Socialists', and Anarchists' international congresses also met in or near The Hague, during the sessions of the conference, and each of these had its word of appeal, reproach, or denunciation for the work of the Conference of Peace.

VI. ORGANIZATION

a. THE CONFERENCE OF 1899

Although the president of the conference, Baron de Staal, of Russia, was entirely inexperienced in parliamentary government and law, the leading delegates from Western Europe, Great Britain, and the United States were remarkably well versed in their principles and practice; and under their guidance an excellent organization was effected. The first delegates from the various governments formed a kind of "cabinet" of advisers to the president, and within this cabinet there existed a kind of "steering committee," composed of the first delegates from the seven "great powers"; to these were added later the other leading spirits of the conference, and although they acted entirely unofficially their influence was real and effective.

In their first conclave on the day before the conference formally opened — and the conference ratified their decisions the next day — it was decided that on the basis of the three main topics proposed for discussion in the Russian Programme the conference should be divided into three main "commissions." These were: I Commission, in charge of the question of armaments and the use of new kinds of implements of warfare;[1] II Commission, in charge of the laws and customs of warfare;[2] III Com-

[1] Articles 1 to 4 of the Russian Programme; see later, page 45.

[2] Articles 5 to 7 of the Russian Programme.

mission, in charge of arbitration and other means of preventing warfare between nations.[1]

The I and II Commissions were each subdivided into two subcommissions dealing with military and with naval matters respectively; and the III Commission appointed a single "committee of examination," to report upon the various plans of arbitration submitted to it. Thus, the various organs of the conference were as follows: the *Conference* itself, which gave formal ratification to the proposals adopted by the commissions; *the I, II, and III Commissions*, which considered the reports of their subcommissions; and the five *subcommissions*, which did the difficult, constructive work of the conference. In addition to these bodies there were also the *Commission on Petitions*, in charge of the various memorials sent to the conference, and the *Commission on Editing*, appointed near the end of the conference to edit the "conventions," or treaties agreed upon.

The various subdivisions of the conference having been determined, the method of procedure was very simple. In each subcommission the Russian members would explain the proposal of their government on the point in question; the subcommission, in its subsequent meetings, would reject, accept, or amend these proposals; a "reporter" appointed at the first session of the subcommission would then present his report of the decisions made by the subcommission, which would accept or amend his report; this amended report would then be discussed in a reunion of the commission concerned; and the commission's final report would be presented in a plenary session of the conference itself which would order its incorporation in the

[1] Article 8 of the Russian Programme.

definitive agreements. But even after having run the gauntlet of the subcommission, commission, and conference, some of the delegations would not accept in their governments' names some of the proposals agreed upon; and some of the proposals recommended by delegations to their governments have not yet been adopted by them.[1]

Each state had the right of being represented on each of the commissions, and it was left to the delegations, or the first delegates, to decide which of their members should become members of the various commissions; but in the commissions, as in the conference, each state had only one vote. The membership of the first three commissions was 50, 67, and 59, respectively; and the countries were represented on them by from one to six members each, Russia having, in all three cases, the largest number. The Commission on Petitions numbered fifteen members, and that on Editing four.

The distribution of the offices was both an important and a delicate task; but the choice of the really important officials proved to have been most wise and successful, while the creation of a number of honorary offices prevented international jealousies. The important offices were those of the president of the conference, and the three presidents of the first three commissions. The honorary offices were those of the honorary president and vice president of the conference, the two adjunct and seven honorary presidents of the commissions, and the sixteen vice presidents[2] of the subcommissions.

[1] This fact will be adverted to again in the XIV section of this book, entitled, "A Summary of Results."

[2] Six of these were really vice presidents of the III Commission, which did not divide into subcommissions.

The initiator of the conference having been Russia, its first delegate, Baron de Staal, was made president of the conference; and three eminent European statesmen and jurists, Beernaert of Belgium, De Martens of Russia, and Bourgeois of France, were made presidents of the first three commissions. Upon these four men and the ten secretaries [1] devolved the administrative work of the conference; but in all important matters they were advised by the "cabinet" and the "steering committee" mentioned above.

The twenty-seven honorary offices were distributed among thirteen of the twenty-six countries represented. The Netherlands, as the host of the conference, was given the first two honorary offices, its minister of foreign affairs being appointed honorary president, and its first delegate vice president, of the conference. The Netherlands received two more of the honorary offices, as did also Austria and Turkey; Germany received four; Great Britain, France, and Italy, three each; six other countries [2] received one each.

b. THE CONFERENCE OF 1907

The second conference followed very closely the wise precedents set by the first in regard to organization. A "cabinet" of first delegates was not again necessary, and, with forty-four governments represented, such a cabinet would have proved unwieldy. But an "inner circle," or "steering committee," of a comparatively few leading

[1] The secretaries were not delegates to the conference, but were appointed from four different countries: six from the Netherlands, two from France, one from Russia, and one from Belgium.

[2] The United States, Spain, Portugal, Sweden and Norway, Denmark and Switzerland.

spirits, chiefly delegates from the "great powers," made their preponderating influence felt at critical times.

This conference, too, was divided into commissions, subcommissions, and committees of examination. The commissions were six in number, namely: Commissions I, II, III, and IV, the Commission on Petitions, and the Commission on Editing. The I Commission, usually called the Arbitration Commission, was divided into two subcommissions: the first, with 103 members, having to consider the various plans of arbitration and prevention of warfare; the second, with 89 members, having to do with maritime prizes.

The II Commission, usually called the Commission of War on Land, was divided into two subcommissions: the first, with 79 members, dealing with the laws and customs of war on land; the second, with 82 members, having to consider the rights and duties of neutrals on land and the declaration of war.

The III Commission, usually called the Commission of War on Sea, was divided into two subcommissions: the first, with 73 members, having to consider the bombardment of ports and the use of submarine mines and torpedoes; the second, with 82 members, having to do with the conduct of belligerent ships in neutral ports, and with the application of the Geneva Convention to maritime warfare.

The IV Commission, usually called the Commission on Maritime Law, was not subdivided, but its 114 members discussed together a number of questions concerning maritime warfare which did not come within the province of the III Commission.

The Commission on Petitions, composed of five members, was appointed at the second plenary session of the confer-

ence, on the 19th of June, and presented two reports, one on the 20th of July, and one on the 17th of October.

The Commission on Editing, composed of twenty-nine members, was not appointed until the 20th of July, and its single report was presented to the conference at the ninth and tenth plenary sessions.

The procedure was the same in the second conference as in the first. The Russian propositions would be presented, explained, and discussed in a subcommission; sometimes a special "committee of examination" would be appointed by a subcommission to scrutinize and report upon propositions submitted by various delegations; then the committee's report, or the report of the subcommission's "reporter," would be discussed and amended; the commission would next pass upon its subcommission's decisions; and finally the conference would formally approve the recommendations of the commission. In this procedure the commissions' presidents, reporters, and committees of examination fulfilled an important service in crystallizing the long discussions of the subcommissions and commissions, and in formulating results for final action.

In the distribution of offices, Russia was again given the presidency of the conference, her first delegate, M. Nelidow, being chosen for this honor. The Netherlands minister of foreign affairs and its first delegate were again made honorary president and vice president of the conference. The presidencies of the first four commissions went to Bourgeois,[1] of France; Beernaert,[2] of Belgium; Tor-

[1] M. Bourgeois had been the president of the first conference's III Commission, that on arbitration, which had become the I Commission of the second conference.

[2] M. Beernaert had been the president of the first conference's I Commission, that on armaments, which topic was not assigned to a separate commission by the second conference.

nielli, of Italy; and Martens,[1] of Russia. In addition to these four presidents of commissions, all of whom presided over one or two subcommissions, there were two other men, Asser of the Netherlands and Hagerup of Norway, who presided over two subcommissions.

Upon the seven active presidents and the twenty-four secretaries [2] devolved the administrative labors of the conference, but as in the first conference they were advised in all important matters by the "inner circle" of leading delegates.

In addition to the honorary offices of honorary president and vice president of the conference, which went to the Netherlands, there were twenty-nine honorary, adjunct, and vice presidencies, which were distributed among twenty-three of the forty-four countries represented. Of the eleven honorary and two adjunct presidencies, the United States and Austria received two each, and nine other countries [3] one each. Of the sixteen vice presidencies, four went to four of the above-named countries,[4] and the rest to twelve others.[5]

[1] M. de Martens had been president of the first conference's II Commission, that on the laws and customs of warfare, which topic was assigned by the second conference to its II, III, and IV Commissions.

[2] The secretaries were not members of the conference, but were appointed from different countries: ten from the Netherlands, four from Russia, three from France, two from Belgium, and one each from Roumania, the United States, Spain, Great Britain, and Panama.

[3] These nine were: Great Britain, Germany, Italy, Spain, Portugal, Japan, China, Turkey, and Brazil.

[4] Great Britain, Germany, Italy, and Austria.

[5] France, Denmark, Sweden, Norway, Switzerland, Greece, Roumania, Servia, Persia, Mexico, Argentina, and Chili.

VII. MEETINGS

a. THE CONFERENCE OF 1899

The meetings were of three kinds, corresponding to the three kinds of assemblies. The conference held "plenary sessions," the commissions held "reunions," and the subcommissions and committees held "meetings."

The plenary sessions of the first conference were ten in number, and were held on the following dates: May 18, 20, and 23; June 20; July 5, 21, 25, 27, 28, and 29. Seven of these were of a chiefly formal character and may be briefly alluded to; the first, second, and tenth sessions require a somewhat fuller treatment.

At the *third* session, the members of the first three commissions were announced, the conference having approved of creating these commissions at its second session on the 20th of May, and the members having been assigned to them during the two subsequent days. At the *fourth* session, the report of the II Commission on the extension of the Geneva Convention to naval warfare was adopted, and the Commission on Editing was appointed. At the *fifth* session, the report of the II Commission on the laws and customs of war was adopted, and the American delegation's propositions concerning the immunity of private property on the high seas in time of war were referred to a future conference. At the *sixth* session, the report of the I Commission on armaments and on the

employment of novel instruments of warfare was adopted. At the *seventh* session, the report of the III Commission on the peaceful adjustment of international differences was adopted, subject to the declaration of the United States in regard to the Monroe Doctrine. The *eighth* and *ninth* sessions were devoted to a discussion of the Final Act, and to the placing upon record of various formal declarations.

The *first* session was held upon the Czar's birthday, May 18, in the afternoon. In the morning of that day, the Russian delegates attended high mass in honor of their emperor's birthday. This was the only religious ceremony even remotely connected with either conference; and even it was criticised as being out of place in connection with an assembly whose members were devotees of so many different religions.

At two o'clock in the afternoon, in the Orange Hall of the House in the Woods, the conference was called to order by the Netherlands minister of foreign affairs, M. de Beaufort. In the course of his address, M. de Beaufort made this noteworthy prediction: "The day of the meeting of this conference will be, without contradiction, one of the days which will mark the history of the century about to close." After welcoming the conference in the name of the Queen of the Netherlands, and commending the Czar for convoking an assembly with "the mission of seeking the means of putting a limit upon increasing armaments and of preventing calamities which threaten the whole world," M. de Beaufort proposed that a telegram of congratulations be sent to the Czar, and that Russia's first delegate be elected president of the conference. Both of these proposals were unanimously accepted, and M. de Staal made a short address of thanks for the honor conferred upon him,

and of appreciation of "the historic soil of the Netherlands," "the cradle of the science of international law," in which, through the hospitality of the Queen, they had come together. At the suggestion of M. de Staal, a telegram of greeting was then sent to the Queen; the two honorary officers and the secretaries of the conference were appointed; a motion for secret sessions was passed; and the first meeting of the historic assembly came to an end, after a duration of one half hour.

At the *second* plenary session, May 20, two telegrams of thanks and good wishes from the Queen and the Czar were read, the creation of the first three commissions was approved, and M. de Staal made his formal presidential address. Stating the principal aim of the conference to be that of seeking "the most effective means of assuring to all nations the benefits of a real and durable peace," M. de Staal noted the fact that "the instinct of the peoples, anticipating the decision taken on this point by the governments, has given to our assembly the name of Peace Conference." "The Peace Conference," he said, "must not fail in the duty which devolves upon it; there must result from its deliberations something tangible, something which all mankind confidently expects. The eagerness which all the powers have shown in accepting the proposition contained in the Russian circulars is the most eloquent testimony of the unanimity accorded to ideas of peace. . . . The nations have an ardent desire for peace, and we owe it to humanity, we owe it to the governments which have confided their powers to us here and which have in charge the welfare of their people, we owe it to ourselves, to accomplish a useful work in determining the method of employing some of the means designed to

insure peace. . . . It is not a question of entering the domain of Utopia. In the work which we are about to undertake, we should keep in view the possible, and not attempt to seek for abstract ideals. Without at all sacrificing our ulterior hopes,[1] we should remain within the realm of reality and test it to its lowest depth, so as to lay solid foundations and build on concrete bases." After praising the attempts of diplomacy to smooth away international differences and jealousies which, in spite of many mutual interests and bonds between the nations, inevitably arise, Baron de Staal said that although "diplomacy long ago admitted arbitration and mediation within its practice, it has not determined the method of their employment, nor has it defined the cases in which they should be applied. It is to this high task that we are to devote our efforts, sustained by the conviction that we are striving for the welfare of all mankind along the path which preceding generations have traced for us." After alluding to the other two parts of the Russian programme, the mitigation of the horrors of warfare and the limitation of armaments, the orator concluded with the words: "Such, then, gentlemen, are the essential ideas which should in general direct our deliberations. We shall consider them, I am sure, in a lofty and genuinely conciliatory spirit, for the purpose of pursuing the path which leads to the consolidation of peace. We shall thus accomplish a useful task, for which future generations must thank the sovereigns and governments represented within these walls."

[1] This expression was denounced in many newspapers as an evidence of Russia's determination to push on, in spite of the Peace Conference which it had called, in its career of territorial aggrandizement. If such had been Staal's meaning, he would have been too astute to confess it; what the words implied were, of course, ulterior hopes of universal and permanent peace.

The *tenth* and last plenary session was held at three o'clock in the afternoon of Saturday, the 29th of July. The morning of that day had been devoted to the signing of the various conventions and declarations agreed upon. These documents had been engrossed and the seals of the various signatory powers affixed to them; they were then spread out on the tables in the dining room of the House in the Woods, and the delegates from each country in alphabetical order came out from the Orange Hall to sign them. At the plenary session in the afternoon, the signatures were first reported on; then the president stated that at the request of the government of the Netherlands he would have the secretary read to the conference a letter from the Queen of the Netherlands to the Pope and the Pope's reply to it. These letters had to do with the meeting of the conference at The Hague and the Pope's non-participation in it;[1] and many of the delegates considered this rather remarkable action on the part of the Netherlands government and the president of the conference as unnecessary and indeed ill-advised, especially in view of the fact that the first delegates had been kept in ignorance of the existence of the letters, which had been written in May, and of the intention to have them read to the conference. Immediately after this ceremony, the president delivered his farewell address. This was responded to by Count Münster, the first delegate from Germany. Baron d'Estournelles, of France, and M. de Beaufort, of the Netherlands, then made brief addresses,[2] after which the president declared the first Peace Conference adjourned without day.

[1] See page 11.

[2] These four addresses had to do chiefly with the results of the conference, and will be alluded to later, under the appropriate topic.

The I Commission held eight reunions, at intervals from the 23d of May to the 20th of July. Its first subcommission held six meetings, from May 26 to June 26; and its second subcommission held seven meetings, from May 26 to June 30.

The II Commission held four reunions, from May 23 to July 5; its first subcommission held five meetings, from May 25 to June 15; and its second subcommission held twelve meetings, from May 25 to July 1.

The III Commission held nine reunions, from May 23 to July 25; and its committee of examination held eighteen meetings, from May 26 to July 21.

It was in these twenty-one commission reunions and forty-eight subcommission and committee meetings that the detailed business of the conference was transacted. Their deliberations will not be taken up separately and in chronological order in this book, but will be narrated according to topics discussed.

b. THE CONFERENCE OF 1907

The second conference, although it continued eight weeks longer than the first, held only one more plenary session. These were eleven in number and were held on the following dates: June 15 and 19; July 20; August 17; September 7, 21, and 27; October 9, 16, 17, and 18.

The *first* session was opened at three o'clock in the afternoon of June 15 by the Netherlands minister of foreign affairs, Jonkheer van Tets van Goudriaan, who in welcoming the conference to The Hague mentioned the part played in its convocation by the Czar and the Queen; and of President Roosevelt he spoke as follows:

"But I think that it would be improper to omit at this hour the tribute of our gratitude to the eminent statesman who presides over the destinies of the United States of America. President Roosevelt has powerfully contributed to the growth of the grain sowed by the august initiator of the solemn international assemblies convoked for the discussion and better definition of the rules of international law."

On the motion of M. van Tets, a telegram of greeting was sent to the Czar, and the first delegate from Russia, M. Nelidow, was chosen president of the conference.

M. Nelidow nominated the honorary president, the vice president, and the secretaries of the conference, and proposed that a telegram of greeting be sent to the Queen; he also referred to the part played in convoking the conference by "the eminent head of the great North American Confederation, whose generous impulses are inspired always by the noblest sentiments of justice and humanity." In speaking of the work of the conference, "the discussion in common of the dearest interests of humanity — those of conciliation and justice," M. Nelidow said:

"Every friend of civilization follows with sympathetic interest the progress of international institutions growing out of the first Peace Conference, and a generous citizen of the United States has given a fortune for the erection here of a sumptuous palace where they will have their permanent seat. It is for us to make them worthy of this munificent act, and thereby to prove to Mr. Carnegie our appreciation. But let us not be too ambitious. Let us not forget that our means of action are limited; that nations are living beings as truly as are the individuals who compose them; that they have the same passions, the same aspirations, the same defects, the same illusions. . . . But let not that discourage us from dreaming of the ideal of a universal peace and a brotherhood of peoples, which are after all only the natural and higher aspirations of the human soul. Is not the essential condition of all progress the pursuit of an ideal towards which one always strives without ever being able to attain it? *Excel-*

sior is the motto of progress. Let us then bravely take up the work before us, having as the light of our path the luminous star of peace and justice, to which we shall never attain, but which will lead us always towards the welfare of humanity."

After a duration of thirty-five minutes the session closed.

At the *second* plenary session, telegrams from the Queen and Czar were read; the organization of the conference and the few rules necessary for its procedure were adopted; the president announced that the governments represented at the second conference which had not participated in the first had given in their adhesion to the acts of the first; the German and British delegations announced that they would propose the establishment of an international court of appeal to adjudicate cases of prizes taken in naval warfare; and the United States delegation announced that it would reserve the right of introducing the question of the collection of public debts by force, or any other question not mentioned in the programme. The session lasted forty-five minutes.

The *third* plenary session, after the presentation of the report of the Commission on Petitions, was devoted to the discussion and adoption of the III Commission's report on the application of the Geneva Convention to maritime warfare.

At the *fourth* plenary session, reports from the II and III Commissions on the laws and customs of war on land, and on the bombardment of seaports, were adopted, and the question of the limitation of armaments was disposed of.

The *fifth* plenary session was devoted to the adoption of the II Commission's report on the declaration of war and the rights and duties of neutral states, and to a discussion of the same commission's report on the treatment of neu-

trals in the territory of belligerents, which was referred back to the commission.

The *sixth* plenary session was opened by the announcement that, "under the ægis of the conference," a treaty of arbitration had just been concluded between Italy and Argentina; the amended report of the II Commission on the status of neutrals in belligerent territory was read and adopted; the report of the I Commission establishing an International Prize Court, and the report of a special committee fixing a time for the convocation of a third Peace Conference, were also read and adopted.

At the *seventh* plenary session, the laws and customs of warfare on the sea, elaborated by the IV Commission, were reported and adopted.

At its *eighth* plenary session, the conference approved the III Commission's reports on the location of submarine mines, and on the conduct of warships in neutral ports in time of war.

The important reports of the I Commission on the Permanent Court of Arbitration and on the extension of obligatory arbitration were adopted at the *ninth* plenary session; the resolution offered by Baron d'Estournelles de Constant, in regard to the construction of the Peace Palace, was unanimously adopted ;[1] and the Commission on Editing began its report on the Final Act.

The report of the Commission on Editing was completed at the *tenth* plenary session, and the Final Act was adopted; the Commission on Petitions also made its final report.

The *eleventh* and last plenary session, October 18, was devoted to addresses of farewell, delivered by President Nelidow, Vice President de Beaufort, of the Netherlands,

[1] See page 20.

Sir Edward Fry, of Great Britain, Count Tornielli, of Italy, M. Saenz Peña, of Argentina, M. Pérez Triana, of Colombia, M. Tzudzuki, of Japan, Samad Khan, of Persia, and M. van Tets van Goudriaan, the Netherlands minister of foreign affairs, and the honorary president of the conference. These addresses were devoted partly to congratulations and thanks extended to various officials and governments, and partly to a discussion of the general results of the conference. From this latter point of view, two or three of them are of historic interest and will be referred to again.[1]

The I Commission held ten reunions, between June 22 and October 11; its first subcommission, and its various committees, met forty-seven times; and its second subcommission and committee met six times. The II Commission's reunions were six in number, and extended from June 22 to September 9; its first subcommission met five times, and its second subcommission seven times. The III Commission held eight reunions, between June 4 and October 4; its first and second subcommissions met four and five times, respectively. And the IV Commission's reunions, extending from June 24 to September 26, numbered fourteen, while its committees held twenty-one meetings.

When it is recalled that many of these nearly eight score meetings were several hours in length, it must be admitted that the conference's four months of existence were laborious ones; but, on the other hand, it must remain a source of surprise as well as of gratification that so many results of weighty import were accomplished in meetings comparatively few in number and extending over only four months.

[1] See Section XIV: A Summary of Results.

VIII. PROGRAMME

a. THE CONFERENCE OF 1899

For some time after the publication of Count Mouravieff's rescript of August 24, 1898, suggesting a conference, it was thought that the Russian government would have no definite proposals to bring before the conference, but would simply introduce the subject of the limitation of armaments, hoping that in the course of the discussion some practical solution of the problem might arise. But as this plan was too indefinite to be fruitful of practical results, a second Russian rescript was issued January 11, 1899 [Russian style, December 30, 1898], containing the following suggestions as to a definite programme:

"The subjects to be submitted for international discussion at the conference may be summarized, in general terms, as follows:

"1. An understanding stipulating the non-increase, for a definite period, of the present effective military and naval forces, and also of the military budgets pertaining to them; and a preliminary investigation of the means by which even a reduction in these forces and budgets may be secured in the future.

"2. A prohibition of the introduction, in armies and navies, of any new kinds of firearms whatsoever, as well as of new explosives or any powders more powerful than those now in use, either for muskets or for cannon.

"3. A restriction of the use, in military campaigns, of the formidable explosives already existing; and a prohibition of the hurling of projectiles or explosives of any kind from balloons or by analogous means.

"4. A prohibition of the use, in naval warfare, of submarine torpedo boats or plungers, or of other similar engines of destruction; and an agreement not to construct in the future war vessels with rams.

"5. The application to naval warfare of the stipulations of the Geneva Convention of 1864, on the basis of the additional articles of 1868.

"6. The neutralization of ships or boats employed in saving those overboard during or after naval battles.

"7. A revision of the Declaration concerning the laws and customs of war, elaborated in 1874 by the Conference of Brussels and remaining unratified to the present day.

"8. The acceptance, in principle, of the employment of good offices, of mediation and of facultative arbitration, in cases adaptable to them, with the object of preventing armed conflicts between nations; an understanding as to the method of their application, and the establishment of a uniform practice in their employment."

No amendments or reservations were made by the other governments in accepting this Russian programme, and it became the basis of the conference's discussions and, as we have seen, of the division of work between the first three commissions. The order of topics in the Russian programme was followed in assigning them to the three commissions, armaments coming first and arbitration last; but Baron de Staal, in his opening address, inverted this order, placing arbitration first and dwelling chiefly upon it, while armaments came last in his mention of topics and received least attention from him. It may be remarked that the conference itself emphasized this illustration of the old adage that "the first shall be last, and the last shall be first"; for it devoted itself chiefly to the topic of arbitration and achieved its most noteworthy triumphs in connection with it. When the second conference was summoned, arbitration was made the first topic on the programme, and it was assigned to the I Commission.

After the enumeration of topics suggested for discussion, the Russian rescript of January 11, 1899, continued: "It is quite understood that all questions concerning the political relations of states, and the order of affairs established by treaties, as in general all questions which do not fall directly within the programme adopted by the cabinets, should be excluded absolutely from the deliberations of the conference." In Baron de Staal's opening address to the conference, he too emphasized this exclusiveness of the programme by saying, after its eight topics had been assigned to the first three commissions: "It is understood that, outside of the topics mentioned above, the conference does not consider itself competent to consider any other question. In case of doubt the conference shall have to decide whether any proposition, originating in the commissions, is or is not within the scope of the topics outlined."

This ruling of the president was adhered to, and in the few instances where new propositions were introduced in commissions or subcommissions, the conference declined their discussion on the ground of "no jurisdiction."

b. THE CONFERENCE OF 1907

When the Russian government issued its call for the second conference, April 6, 1906 (Russian style, March 24, 1906), it published a programme of topics for discussion, and as introduction to it said: "In taking the initiative in convoking a second Conference of the Peace, the Imperial Government has had in view the necessity of giving a new development to the humanitarian principles which served as the basis of work for the great international assembly of 1899." After stating the reasons for this necessity

in regard to arbitration and warfare upon land and sea, the Russian circular continues:

"Believing, then, that there is reason at present for proceeding with the examination of only those questions which are especially prominent, inasmuch as they have arisen from the experience of recent years, and without raising those which concern the restriction of military or naval forces, the Imperial Government proposes as the programme of the projected meeting the following principal points:

"1. Improvements in those provisions of the convention relative to the settlement of international disputes which have to do with the Court of Arbitration and the International Commissions of Inquiry.

"2. Additions to the provisions of the convention relative to the laws and customs of warfare on land: among others, those concerning the opening of hostilities, the rights of neutrals on land, etc.; and, one of the declarations of 1899 having lapsed, the question of its renewal.

"3. The elaboration of a convention relative to the laws and customs of maritime warfare, concerning:

"special operations of maritime warfare, such as the bombardment by a naval force of cities, towns and villages, the placing of torpedoes, etc.;

"the transformation of merchant vessels into war ships;

"the treatment of the private property of belligerents on the sea;

"the interval of grace accorded to merchant vessels for leaving neutral ports or the ports of the enemy after the opening of hostilities;

"the rights and duties of neutrals on the sea: among others, questions of contraband, the treatment of belligerent ships in neutral ports, the destruction by superior force of neutral merchant vessels captured as prizes.

"In this convention, also, should be introduced provisions relative to warfare on land which might be equally applicable to warfare on the sea.

"4. Additions to the convention of 1899 for the adaptation to maritime warfare of the principles of the Geneva Convention of 1864."

The above programme was subjected to the following condition: "As was the case with the Conference of

1899, it will remain quite understood that the deliberations of the proposed assembly should affect neither the political relations between states, nor the order of affairs established by treaties, nor, in general, the questions which do not fall directly within the programme adopted by the cabinets."

This condition, however, was not indorsed by all of the governments when they accepted the Russian invitation to be represented at the conference, and they accordingly made certain reserves. The United States reserved the liberty of submitting two supplementary questions, namely: that of the reduction or limitation of armaments, and that of an agreement to observe certain limitations in the use of force for the collection of ordinary public debts arising from contracts.

Spain expressed its desire to discuss the limitation of armaments, and reserved the right of introducing this question.

Great Britain announced that it attached great importance to having the question of expenditures for armaments discussed, and reserved the right of introducing it; it also reserved the right of abstaining from the discussion of any question mentioned in the Russian programme which should appear to it to lead to no useful result.

Japan believed that certain questions not specifically enumerated in the programme might be profitably included among those to be examined, and reserved the right of abstaining or withdrawing from any discussion taking or promising to take a direction not conducive, in its judgment, to a useful result.

Bolivia, Denmark, Greece, and the Netherlands also reserved the right of proposing for consideration other

subjects analogous to those specifically mentioned in the Russian programme.

Germany and Austria reserved the right of abstaining from the discussion of any question not appearing to tend towards a practical result.

Even Russia, after being informed of these various reservations, declared that it would maintain its programme of April, 1906, as the basis of the deliberations of the conference, but that it would reserve in its turn the right of abstaining from the discussion of any question not appearing to tend towards a practical result.

At least eleven of the countries invited having made reservations as to the programme, and some of them in a very positive, not to say belligerent, manner, it looked for a time as though the second Peace Conference would have a very stormy career, or would probably not enter upon any career at all. But through the persuasive influence of diplomacy, and especially, it is believed, as a result of a visit made by Professor de Martens, of Russia, to several of the great powers which had made reservations, it was decided that they would send representatives to the conference, and that, in the words of Chancellor von Bülow, of Germany, they would be "content to leave to those powers which are convinced that such discussions will yield a genuinely successful result, the burden of carrying them on."

This decision was carried out, and all the powers were represented at the conference; but at its second session (its first real business session), the United States delegation reserved the right of presenting "the question of the collection of public debts by force, or any other question not mentioned in the programme"; and the British delegation also reserved "the right of formulating new propositions

later." President Nelidow admitted the right claimed by the two delegations, but ruled that every new proposition, not included within the subjects enumerated in the programme, should first be communicated in writing to the president of the conference and immediately printed and distributed among the members. This ruling was accepted, and thus the first great obstacle of the second conference was avoided.

IX. ARMAMENTS

a. THE CONFERENCE OF 1899

For centuries it has been the belief of the civilized world that "if you wish for peace, you must prepare for war" (*si vis pacem, para bellum*); and for centuries it acted upon that belief. But it remained for Prince Bismarck, the "Iron Chancellor" of Germany, to develop this rather vague and often insincere belief into a genuine "barracks philosophy," which was applied by him most vigorously in his own country and was adopted with as much thoroughness as possible by the governments of other European states. Possessed not so much by a genuine love of peace as by a genuine fear of the consequences of war, Bismarck converted Prussia and Germany into a modern Sparta as nearly as the circumstances of the Nineteenth Century would permit; and the other statesmen of Europe, following his example, made of Europe an armed camp.

The creation and increase of armaments went on at such a pace that "armed peace" became more burdensome than actual war had been a generation before; and, like the mediæval knights who, settling disputes by appeals to the ordeal of battle, had so increased their armor that its weight kept them prone upon their backs if they chanced to fall, so the civilized states of Europe came to see that their appeal to the god of battles for the settlement of disputes involved such enormous expenditures in time of

peace that they were badly crippled when warfare actually began.

These considerations burned themselves in upon the minds of the peoples, upon whose backs the military burden necessarily rested, and when Bismarck fell from power in 1890 they hoped that his system of "blood and iron" would end. Less than a month after Bismarck's death (July 30, 1898), the Czar issued his rescript for the first Peace Conference, and the peoples at once made their wish the father of their thought and said that now disarmament would surely come.

But it was not disarmament that the Czar's rescript proposed. It did allude to "a possible reduction of the excessive armaments which weigh upon all nations" as an "ideal towards which the endeavors of all governments should be directed." It denounced the system of increasing armaments as "a blow at the public prosperity in its very source," as "paralyzing or checking the development of national culture, economic progress, and the production of wealth," as a prime cause of economic crises, and as an "inevitable cause of the very cataclysm it is designed to avert." And it contained these emphatic words: "To put an end to these incessant armaments and to seek the means of warding off the calamities which threaten the whole world — such is the supreme duty which is imposed to-day upon all states." But it was the *increase* of armaments that the Russian statesmen had in mind, and that the rescript was designed to emphasize and the conference to consider. When Count Mouravieff read the rescript to the foreign diplomatists he requested the British Ambassador, Sir Charles Scott, to observe 'that this eloquent appeal, which he had drawn up at the dic-

tation of the Emperor, did not invite a general disarmament, as such a proposal would not have been likely to be generally accepted as a practical one at present, nor did His Imperial Majesty look for an immediate realization of the aims he had so much at heart, but desired to initiate an effort, the effects of which could only be gradual.'

Count Mouravieff's second circular, January 11, 1899, suggested a programme of topics for the conference, and mentioned first on the list the subject of armaments, in the following words: "An understanding stipulating the non-increase, for a definite period, of the present effective military and naval forces, and also of the military budgets pertaining to them; and a preliminary investigation of the means by which even a reduction of these forces and budgets may be secured in the future."

This first article of the Russian programme was assigned to the I Commission at the time of its creation, and its importance was thus emphasized by the commission's president, M. Beernaert, of Belgium:

"Among the tasks of high importance which lie before the conference, our I Commission has, perhaps, the most sacred. We have especially to study, to discuss, to realize, the master ideal which has created this great international assembly, the ideal, namely, of assuring to the peoples a durable peace, and of placing a barrier to the progressive and ruinous development of military armaments. Such is the principal object of the message, henceforth famous, of the 24th of August, 1898. . . . And with Emperor Nicholas II himself, these are no new aspirations. Some years ago he made a present of a bell to I know not what town of France — to Chateâudun, I think, — and on the bronze he had engraved the words: 'May it never ring other than the hour of concord and of peace.' May this beautiful device, gentlemen, inspire our labors."

The subject was thus opened at the commission's

second reunion, May 26; but, in commenting on the order of work, M. Beernaert said:

"At first sight, it would seem quite natural to begin at the beginning, and discuss first that problem, fundamental and of high importance, which is first submitted to our investigation. But I believe it right to recommend a contrary procedure, and it is the inaugural address of our honorable president [of the conference] that has suggested to me the idea. Limitation of armaments, which forms the frontispiece of the circular of the Russian government, appeared in his address as a conclusion and as a kind of crown — a triumphal crown — of our mutual efforts. Yesterday, too, an analogous procedure was followed by the II Commission; in its examination of the project discussed at the Conference of Brussels the last chapters were taken up first, so as to reserve until the last those questions on which an agreement appeared more difficult of formation. It is by harmony that we should desire to arrive at harmony."

The commission shared its president's opinion, and the subject was not taken up for discussion until June 23, a month after the opening of the conference, and a month before its adjournment. M. Beernaert again emphasized the importance and difficulties of the question, and requested Baron de Staal to present the Russian proposals. De Staal then spoke of the great need of "alleviating the burdens of peace, not by disarmament, but by a limitation, a halt, in the ascending course of armaments and expenditures," and said that Russia's technical delegates would present the Russian proposals. Before this was done, however, General den Beer Poortugael, of the Netherlands, made a short but powerful appeal for the plans about to be presented, basing it upon the evils and dangers of increasing armaments, which he likened to the wicked fairy's fatal gift found at the bottom of Pandora's box, and threatening the ruin of Europe. "To our govern-

ments," he exclaimed, "bound together by the cord of our military organizations, like Alpine tourists, the Czar has said: 'Let us make a united effort, let us halt on this edge of the abyss; if not, we shall perish!' Let us halt, gentlemen; let us make this supreme effort, let us hold fast!"

Colonel Gilinsky then introduced the Russian propositions in regard to land forces by a speech emphasizing the evils of armaments and the need of restricting them.

"Gentlemen," said he, "will the peoples represented in this conference be entirely satisfied if, in going hence, we take them arbitration and the laws of warfare, but nothing for times of peace, — of this *armed* peace which is so heavy a burden on the nations, which crushes them to that point where it can be sometimes said that open war would perhaps be better than this state of secret war, this incessant competition in which all the world pushes forward larger and larger armies, — larger now in time of peace than they used to be in times of greatest warfare? The various countries have engaged in war only once in every twenty or thirty years; but this armed peace lasts for decades, it precedes war and follows it."

The propositions submitted by Colonel Gilinsky were as follows:

1. An international agreement for a term of five years, stipulating the non-increase of the present number of troops maintained in time of peace in each mother country.

2. The determination, in case of this agreement, of the number of troops to be maintained in time of peace by all the powers, not including colonial troops.

3. The maintenance, for the same term of five years, of the size of the military budget in force at the present time.

At the same reunion of the commission, Captain Schéine,

of the Russian navy, presented the following propositions in regard to naval forces:

1. The acceptance of the principle of determining, for a period of three years, the size of the naval budget.

2. An agreement not to increase the total sum during this triennial period.

3. The obligation to publish in advance during the said period:

a. The total tonnage of war ships which it is proposed to construct, without defining the types of the ships themselves;

b. The number of officers and men in the navy;

c. The expenses of coast fortifications, including forts, docks, arsenals, etc.

At the next reunion of the commission, June 26, Colonel Gilinsky made some explanatory comments upon his three propositions, and stated that "since colonies often find themselves in danger or even in a state of war, it would not appear possible to prohibit the increase of colonial troops." He also made the following argument as to Russia's distant possessions:

> "Russia has no colonies properly so-called, that is, possessions absolutely separated by the sea. But we have territories which, from the point of view of their defense, are in the same circumstances as are colonies; for they are separated from the mother country, if not by the sea, at least by enormous distances, and by the difficulty of communication."

He cited Central Asia and the military district of Amur as examples of such territories, and proposed that they be treated as colonies, and the increase of their troops left unrestricted.

The Russian proposals then being taken up for dis-

cussion, Colonel von Schwarzhoff, of Germany, first replied to General Poortugael's speech, quoted above, and declared that "as far as Germany is concerned, I can reassure her friends completely and dissipate all benevolent anxiety regarding her. The German people are not crushed beneath the weight of expenditures and taxes; they are not hanging on the edge of a precipice; they are not hastening towards exhaustion and ruin. Quite the contrary: public and private wealth is increasing; the general welfare and standard of life are rising from year to year. As for compulsory military service, which is intimately associated with these questions, the German does not regard it as a heavy burden, but as a sacred and patriotic duty, to the performance of which he owes his existence, his prosperity, his future." He then took up Colonel Gilinsky's propositions and arguments, declaring them to be not quite consistent with each other.

"On the one hand," he said, "it is feared that excessive armaments may cause war; on the other, that the exhaustion of economic forces will make war impossible. As for me, I have too much confidence in the wisdom of sovereigns and nations to share such fears.

"On the one hand, it is pretended that only those measures are necessary which have long been practiced in some countries and which, therefore, present no technical difficulties; on the other hand, it is said that this is precisely the most difficult problem to solve, and that for it a supreme effort is necessary. I am entirely of the latter opinion. We shall encounter, in fact, insurmountable obstacles, — difficulties which may be called technical in a little larger use of the term.

"I believe that the question of troops cannot be considered entirely alone, separated from a crowd of other questions to which it is almost subordinate. Such are, for example, the extent of public instruction, the length of active service, the number of established regiments, the troops in the army units, the number and duration of enrollments under the flag (that is to say, the military obligations of retired sol-

diers), the location of the army corps, the railway system, the number and situation of fortified places. In a modern army, all such things are connected with each other and form, together, the national defense which each people has organized according to its character, its history, and its traditions, taking into account its economic resources, its geographical situation, and the duties which devolve upon it. I believe that it would be very difficult to replace this eminently national task by an international agreement. It would be impossible to determine the extent and the force of a single part of this complicated machinery.

"Again, mention has been made only of troops maintained in mother countries, and Colonel Gilinsky has given us the reason for this; but there are territories which are not part of the mother country, but are so close to it that troops stationed in them will certainly participate in a continental war. And the countries beyond the seas? How can they permit a limitation of their troops if colonial armies, which alone menace them, are left outside of the agreement?

"Gentlemen, I have restricted myself to indicating, from a general point of view, some of the reasons which, to my mind, are opposed to the realization of the desire, which is surely unanimous, of reaching an agreement on the subject before us."

Colonel Gilinsky replied that it would be impossible for him to answer the arguments of a domestic nature advanced by Colonel von Schwarzhoff; but that if an agreement could be arrived at, he believed it would be possible for states to make the necessary arrangements for enforcing it. As to the wealth of nations, he had not said that all countries are being impoverished, for there are some which are progressing in spite of military expenditures; but these expenditures are certainly not an aid to public prosperity. Increasing armaments are not of a nature to augment the riches of states, although some individuals may profit by them. He willingly admitted that railroads have a great influence on the defense of a country; an army should be much larger if it

be unconnected with the interior by numerous railways. It is precisely for this reason that a country rich in railroads may reduce its army, or at least not increase it. As for countries beyond the seas, he admitted exceptions, notably among those whose army is small or in process of formation; what is necessary here is not to adopt a general rule covering everything, but to find a formula satisfactory, if not to every one, at least to a large number.

Colonel von Schwarzhoff replied that he feared lest he had been misunderstood; he had not denied that another use might be found, perhaps more humanitarian, for the money spent on armaments. He merely wanted to reply to language which perhaps, and certainly in his opinion, was a trifle exaggerated. The number of troops alone does not afford a proper basis of comparison for the strength of armies, but there are a number of other things to take into consideration. While maintaining the number of its troops, any power whatever can increase its military strength. The equilibrium which is supposed to exist at present would then be destroyed; for its restoration, it is necessary that the other powers, which perhaps would not be able to employ the same measures, should be free to choose among all the measures accessible to them.

At the conclusion of this debate between the Russian and German colonels, two delegates from the Netherlands replied to some of Colonel von Schwarzhoff's arguments. M. van Karnebeek emphasized the importance of the question of increasing armaments and the desirability of a discussion of it by the conference, notwithstanding its technical difficulties.

"Of course," he continued, "it may be that in some countries military expenditures press less heavily than elsewhere; but it must be recognized that the sums devoted to armaments might, even in those countries, be employed more usefully for a different purpose. There are other countries where people do not take the point of view of Colonel von Schwarzhoff, and where military expenditures are evidently a burden on national prosperity. The question should not be considered only from the point of view of the country whose prosperity, apparently, has not yet suffered because of armaments; but even in these countries, it may be questioned whether such expenditures are really necessary for the national defense, or if they are not rather the result of international competition in this direction. Now, the fundamental idea of the Russian propositions is precisely that the burden of armaments may be reduced if an agreement can be secured for reducing this international competition. But it is necessary to consider the question from still another point of view. There is, for the several countries, not only an external danger to be foreseen, but they have also to take account of opinion at home which, in time, may also become a peril. Enormous military expenditures which burden nations may furnish dangerous weapons against the established social order. And if, because of technical difficulties, we too readily declare ourselves incapable of endeavoring to reach a solution of this important question, we might play the game of those who find it to their advantage to agitate against the existing order of things."

General Poortugael replied briefly to Colonel von Schwarzhoff, and, while congratulating him on Germany's alleged favorable condition in regard to military expenditures, said that it was not the present but the future that he had in mind when he made his first address: "I used the words, 'in continuing in this path,' and I believe now and always that this path is dangerous even for the wealthiest states."

Another feature of this animated debate was the declaration of Dr. Stancioff, of Bulgaria, that "armed peace

is ruinous for small states, whose needs are numerous, and who have everything to gain by investing their means in the development of industry and agriculture, and in the requisites of progress." M. Bourgeois, of France, gracefully acknowledged the force of Dr. Stancioff's remarks by moving that the small states should be represented, as well as the large ones, on the committees which should investigate and report upon the subject. The commission then decided that each of its subcommissions should appoint technical committees, one military and one naval, to consider the question.

The military committee was composed of Colonels Gilinsky and Schwarzhoff, and military representatives from five other large powers and two small powers.[1] This committee met twice, and after a thorough exchange of views — of which no minutes were kept — made the following report to the commission at its next session, June 30:

"The members of the committee charged with the examination of the propositions of Colonel Gilinsky, relating to the first topic of Count Mouravieff's circular, have met twice. With the exception of Colonel Gilinsky, they have decided unanimously: first, that it would be very difficult to fix, even for a term of five years, the number of troops, without regulating at the same time other elements of the national defense; second, that it would be no less difficult to regulate by an international agreement the elements of this defense, organized in each country upon very different principles. Hence, the committee regrets its inability to accept the proposition made in the name of

[1] The members of this committee were as follows: Colonel von Schwarzhoff, of Germany; Captain Crozier, of the United States; General Mounier, of France; Colonel Gilinsky, of Russia; General Sir John Ardagh, of Great Britain; Lieutenant Colonel von Khuepach, of Austria; General Zuccari, of Italy; Captain Brändström, of Sweden; and Colonel Coanda, of Roumania. As to Captain Crozier's membership, see page 67.

the Russian government. The majority of its members believe that a more thorough study of the question by the governments themselves would be desirable."

After this report was read, no one responded to the president's invitation to discuss it, and he therefore said that he considered the silence of the assembly as a complete approval of it, and that under the circumstances it was not necessary to take a vote upon it.

But the question was not to be thus dropped in silence. Baron de Bildt, of Sweden and Norway, stated that the Russian propositions were unacceptable to his country only because of their form and not because of their object, and concluded an eloquent address with the words:

"We have therefore not been able to vote for the Russian proposition as it has been formulated, and I state this fact with sincere regret — I will say more — with genuine sorrow. For, gentlemen, we are about to terminate our labors, recognizing that we have been confronted with one of the most important problems of the century, and that we have accomplished very little towards its solution. Let us not indulge in illusions. When the results of our deliberations shall become known, there will arise, notwithstanding all that has been done for arbitration, the Red Cross, etc., a great cry: 'It is not enough!' And this cry, 'It is not enough,' most of us must conscientiously acknowledge to be just. Our consciences, it is true, may also tell us in consolation that we have done our duty, since we have faithfully followed our instructions. But I venture to say that this duty is not fulfilled and that there yet remains something else for us to accomplish.

"Permit me to explain. The Czar's proposal [as to armaments] has been strewn with all the flowers of rhetoric by men much more eloquent than I. It will suffice for me to say that, while his idea is grand and beautiful, and while it responds to a desire felt by thousands upon thousands of men, this also is true: it can not die. If the Czar will only add to the nobility of heart and generosity of spirit, of which he has given proof, the virtue of perseverance, the triumph

of his labors is assured. He has received from Providence not only the gift of power, but also that of youth. If the generation to which we belong is not destined to accomplish the task, he may count upon that which is coming soon to take our places. The future belongs to him. But, meanwhile, all of us who desire to be, each in his little sphere of activity, his humble and faithful colaborers, have the duty of searching for, and explaining to our governments with entire frankness and complete veracity, each imperfection, each omission, which may occur in the preparation or in the execution of this work; and of seeking with tenacity the means of doing better and doing more, whether these means be found in new conferences, in direct negotiations, or with all simplicity in the setting of a good example. This is the duty which is left for us to fulfill."

This speech was warmly applauded, and under the influence of its profound impression, M. Bourgeois, of France, made a forceful address, in which he said:

"This commission certainly does not wish to remain indifferent to the question of principle presented to the civilized world by the generous initiative of His Majesty the Emperor of Russia. It seems to me necessary that an additional resolution be adopted by us to express more precisely the sentiment which animated the preceding speaker, and which should make us all desire that the work commenced should not be abandoned. This question of principle may be stated in very simple words: 'Is it desirable to restrict the military expenses which burden the world?' . . . We shall find, I hope, a general formula which, recognizing the difficulties of which we are all aware, shall at least express this thought, that the limitation of armaments will be a blessing to mankind, and which shall give to the governments the moral support necessary to enable them to pursue this noble object. . . . If sad necessity obliges us to renounce for the present a direct and positive agreement on this proposition, we should endeavor to prove to public opinion that we have at least sincerely examined the problem presented to us. We shall not have labored in vain if, in a formula of general scope, we indicate the goal towards which we desire unanimously, I hope, to see all civilized peoples advance."

At the request of the president, M. Bourgeois then presented in writing his proposition, which was as follows: "The commission believes that a limitation of the military expenses which now burden the world is greatly to be desired in the interests of the progress of the material and moral well-being of mankind." This proposition was adopted by acclamation; and the commission then turned to the consideration of the question of naval armaments.

The second subcommission of the I Commission decided, at its meeting on June 26, to discuss the question of naval armaments before referring it to a special committee. Captain Schéine explained the Russian propositions,[1] and stated the proposed agreement to be that "each government shall have the right of fixing its budget at the point which seems to it desirable, but once this budget is fixed and communicated, the total sum cannot be increased for a term of three years, dating from the time when the agreement goes into force." The representative of the Netherlands alone expressed approval of the proposition, while the delegates from eight countries, large and small, advanced various objections to it. Among these objections were the facts that parliaments shared with executives the control of budgets; that some parliaments were renewed annually, or within very short periods; that it would be very difficult for one government to decide upon the size of budgets, since it would be ignorant of the size of the budget which other governments would adopt; and that this would lead to the fixing of a very large budget, and might lead to the building of even more ships than would have been built if the international agreement

[1] See page 57.

had not been made. The subcommission rejected (by a vote of five to five, with five abstentions) a motion to refer the problem to the various governments for a thorough study which should enable it to be solved at a later conference. It then adopted a motion of Captain Schéine (by a vote of seven ayes, one no, and seven abstentions) that the delegates be asked to secure instructions from their governments, as soon as possible, so that the Russian propositions might be decided by the existing conference.

This report was presented to the commission at its reunion of June 30, and it was decided that the time before the end of the conference would be too short for the delegates to procure instructions from their governments. It was therefore voted, without final opposition, although Captain Schéine resisted the motion for a time, that the question of naval armaments, like that of military armaments, should be referred to the governments for thorough study, and that M. Bourgeois's motion was also equally applicable to armaments on both land and sea.

The conference, at its sixth session, on the 21st of July, adopted unanimously and without discussion these reports of the commission, and thus the question of armaments was finally disposed of.

The failure of the conference to propose any answer to what was regarded as the burning question of armaments and as the prime cause of its convocation was widely commented upon as evidence of the failure of the conference as a whole. But its leaders denied this by pointing to the other positive work of the conference, and especially to its work in behalf of arbitration. And they insisted with great force that until arbitration, or some other peaceful measure, is adopted for the settlement of international

disputes, the ordeal of battle will continue to be appealed to, and the governments will consider it their duty to prepare for that ordeal by perfecting their armaments. On the other hand, the question of increasing armaments became more prominent than ever, in the years following the conference, because of the enormous accessions almost universally made to them, and a widespread determination arose that it should be definitely answered in the next conference.

As to the precise part played by the delegates from the United States in the disposition of the question of armaments, there is a discrepancy in the records. The official *rapporteur* of the I Commission, M. van Karnebeek, states in his report to the conference, which was unanimously adopted (Captain Crozier being present), that Captain Crozier, of the United States, was one of the committee of experts which rejected unanimously Colonel Gilinsky's proposals for the restriction of armaments; but the *compte-rendu* of the subcommission's meeting, in which the committee was appointed, does not include Captain Crozier as one of the committee. In a subsequent reunion of the commission, M. Beldiman, of Roumania, proposed that the names of the delegates who took part in the work of the technical committee be included in the report to the conference. Captain Crozier opposed this proposition, and stated that the members of that committee had taken part in its work, not as delegates of governments, but as representatives of the subcommission in their quality as individuals and as experts. The representatives of Sweden and Turkey supported Captain Crozier's view, but M. Beldiman's motion was adopted by a vote of twelve to ten (with one abstention), and the *rapporteur* mentioned in

his report to the conference the names of the members of the committee, including among them, as stated above, that of Captain Crozier.

Immediately after this episode in the reunion of the commission, Captain Mahan, of the United States Navy, who, in the meeting of the naval subcommission, had insisted on the difficulties of the Russian propositions, made the following declaration:

"The delegation of the United States of America have concurred in the conclusion upon the first clause of the Russian letter of December 30, 1898, presented to the conference by the I Commission, namely: that the proposals of the Russian representatives, for fixing the size of effective forces and of budgets, military and naval, for five and three years, can not now be accepted, and that a more profound study on the part of each state concerned is to be desired. But, while thus supporting what seemed to be the only practicable solution of a question submitted to the conference by the Russian letter, the delegation wishes to place upon the record that the United States, in so doing, does not express any opinion as to the course to be taken by the states of Europe.

"This declaration is not meant to indicate mere indifference to a difficult problem, because it does not affect the United States immediately, but expresses a determination to refrain from enunciating opinions upon matters which, as concerning Europe alone, the United States has no claim to enter. The words drawn up by M. Bourgeois, and adopted by the I Commission, received also the hearty concurrence of this delegation because, in so doing, it expresses the cordial interest and sympathy with which the United States, while carefully abstaining from anything that might resemble interference, regards all movements that are thought to tend to the welfare of Europe. The military and naval armaments of the United States are at present so small, relatively to the extent of territory and to the number of the population, as well as in comparison with those of other nations, that their size can entail no additional burden of expense upon the latter, nor can even form a subject for profitable mutual discussion."

This declaration is an especially interesting one from the point of view, both of the traditional and the subsequent policy of the United States in regard to European affairs, and of the subsequent development of its military and naval armaments.

b. THE CONFERENCE OF 1907

After the adjournment of the first conference, it was argued that that body had taken up the question of armaments "at the wrong end"; that it had devoted itself chiefly to the balancing of ship against ship and tonnage against tonnage, and had consequently fallen into a hopeless technical tangle and mathematical snarl; that what was needed was a thorough study of the economic and political aspects of the question. But this study, recommended by the conference itself, was not entered upon by the governments; and statesmen continued to suggest mathematical solutions of the problem, such as the reduction of the size of battle ships, or the restriction of military budgets for a term of five years to the amounts expended during the preceding five years.

The Russian programme for the second conference alluded to the subject of armaments, but barred it out from consideration, in the following words: "Believing that there is opportunity at present for proceeding with an examination of only those questions which are pressed forward in a particular manner by the experience of the last few years, without taking up those which may concern the limitation of military or naval forces, the Imperial Government proposes, etc." — This omission has been ascribed to the almost unanimous opposition of the first conference

to Russia's plans for the restriction of armaments, to Russia's belief that its losses in armament during the Russo-Japanese War should be more than made good, and to the fear that to introduce the subject in the second conference would be productive of discord rather than of good results. This last explanation was given by Russia's first delegate, President Nelidow, in his address to the conference when the subject was introduced. After mentioning the various wars which have occurred since the first conference, and the great increase of armaments, instead of the study of their limitation recommended by that conference, which the various governments have undertaken, M. Nelidow said:

"It was in consideration of these circumstances, gentlemen, that the Russian Government omitted to mention this time, in the programme which it proposed for the conference, the limitation of armaments. It believed that this question was not ready to be considered with good results; and it did not wish to provoke discussions which, as the experience of 1899 showed, might only be opposed to the object to be striven for in common, and only accentuate discord between the powers by causing irritating debates."

But for whatever reasons the Russian government had held back in the path which it had been the first to take, the governments of other countries were urged forward upon it by the determined demand of their people. This demand was made with preëminent force in Great Britain; and the Liberal Government there had committed itself willingly, and enthusiastically on the part of the prime minister, to its realization. Hence, both before and at the opening of the conference, Great Britain made a resolute stand for the right of introducing the topic for discussion, even though it had been omitted from the official

programme. The United States joined Great Britain in this determination, and France, Spain, and Italy expressed their willingness to discuss it if introduced; but Japan, Austria, Germany, and Russia gave notice that they would not participate in discussing the question, for which, to quote the words of Chancellor von Bülow, of Germany, "no concrete, serious, practical, realizable answer was presented."

Despite the expressed and powerful opposition to having the question discussed, the delegations of Great Britain and the United States, at the second plenary session — the first business one — reserved the right of presenting it, "or any other question" not on the programme.

More than eight weeks then elapsed, during which time no visible step was taken towards raising the question, although there were many rumors as to what was being done or attempted behind the scenes. During this time the United States delegation was doing its utmost to promote three projects in which it was vitally interested, and was apparently awaiting the lead of Great Britain in the matter of armaments. And in England a lively agitation, in which the Interparliamentary Union took part together with numerous peace societies, was set on foot to urge the British delegation forward. At last, in the fourth plenary session, August 17, Sir Edward Fry, Great Britain's first delegate, took the matter up. After quoting the memorable warning as to increasing armaments and their results which was voiced in the Russian rescript of August, 1898, Sir Edward Fry said:

"These words, so eloquent and so true when they were first written, are to-day still more real and true. For, Mr. President, since that time military expenses, alike for armies and for navies, have

considerably increased. Thus, according to the most exact information which I have received, these expenditures attained in 1898 (that is, the year immediately preceding the first conference at The Hague) a total of more than 251 millions of pounds sterling for the countries of Europe, — with the exception of Turkey and Montenegro, about which I have received no information, — the United States of America, and Japan; whereas the same expenditures by the same countries in 1906 exceeded a total of 320 millions of pounds sterling. . . .

"Such are the excessive expenditures which could be devoted to better purposes; such, Mr. President, is the burden under which our peoples groan; such is the Christian peace of the civilized world in the Twentieth Century. I will not speak to you of the economic side of the question, of the great number of men whom these preparations for war compel to abandon their employments, and of the prejudice which this state of things conveys to prosperity in general. You know better than I this side of the question.

"I am quite sure, then, that you will agree with me in the assertion that the realization of the wish expressed by the Emperor of Russia and by the first conference would be a great blessing to all mankind. Is this wish attainable? That is a question to which I can not give you a categorical reply. I can only assure you that my government is a convinced partisan of these high aspirations, and that it charges me to summon you to work and toil together for the fulfillment of this noble desire.

"In the olden days of antiquity, Mr. President, men dreamed of a golden age which was said to have existed on earth in times long before. But in all centuries and among all nations, poets, sibyls, prophets, and all noble and inspired souls have nourished the hope that that golden age would return in the form of the reign of universal peace. 'Ultima Cumæi venit jam carminis ætas Magnus ab integro sæculorum nascitur ordo Jam redit et virgo: redeunt Saturnia regna.'

"Such was the dream of the Latin poet for his age; but to-day the belief in the solidarity of the human race is spread, more than ever before, over all the earth. It is this belief which has made possible the convocation of the present conference; and it is in the name of this belief that I beseech you not to separate without having demanded that the governments of the world shall devote themselves very seriously to the question of military expenditures.

"My government recognizes that it is the duty of each country to protect itself against its enemies, and against the dangers which may threaten it, and that each government has the right and the duty of deciding what is proper for its country to do for this purpose. It is then only by good will, the free will of each government, acting through its own head for the happiness of its country, that the object of our desires can be attained.

"The government of His Britannic Majesty, recognizing that several powers desire to restrict their military expenditures, and that it is by the independent action of each power that this result can be attained, has believed it to be its duty to seek for the means of fulfilling these aspirations. Hence my government has authorized us to make the following declaration: 'The Government of Great Britain will be ready to communicate each year to the powers that will do the same, its plan of constructing new war ships and the expenditures which this plan will require. Such an exchange of information will facilitate an exchange of views between the governments on the reductions which by common agreement may be effected. The Britannic Government believes that in this way an understanding may be reached on the expenditures which the states that agree to pursue this course will be justified in entering upon their budgets.'

"In conclusion, then, Mr. President, I have the honor of proposing the adoption of the following resolution: The conference confirms the resolution adopted by the Conference of 1899 in regard to the restriction of military expenditures; and, since military expenditures have increased considerably in nearly every country since the said year, the conference declares that it is highly desirable to see the governments take up the serious study of this question."

On the conclusion of Sir Edward Fry's ten minutes address, President Nelidow read the following letter from Ambassador Choate, of the United States:[1]

"In the course of the negotiations which preceded the present conference, the Government of the United States of America thought that it was its duty to reserve the right of proposing here the important

[1] This letter, translated into French and dated at The Hague, August 17, was sent to the president of the conference.

subject of the limitation of armaments, in the hope that this might promote somewhat the realization of the exalted ideal which inspired the Emperor of Russia in his first appeal.

"While regretting that more progress in the direction indicated by His Imperial Majesty could not be made at this time, we are happy to believe that there is not the least intention on the part of the nations to abandon their effort; and we ask permission to express our sympathy for the views which have been stated by His Excellency the First Delegate of the British Delegation, and to adhere to the proposition which he has just made."

When this letter had been read, M. Bourgeois, of France, arose and said that he gladly adhered to the "proposition made by Great Britain and sustained by our colleagues of the United States of America. And it will be permitted, perhaps, to the first delegate of the French Republic, in view of the fact that in 1899 he was the mover of the first conference's resolution, to express his confidence that from this time until the next Peace Conference the study to which the conference invites the governments will be resolutely pursued."

President Nelidow then read a letter from the Spanish delegation expressing similar sentiments; and then the treaty for mutual disarmament concluded between Argentina and Chili five years before, in response to the resolution of the Conference of 1899, was read and vigorously applauded.

M. Nelidow, in closing the "discussion" of the topic, explained, as stated above, why Russia had omitted it from the conference's programme, and concluded his address with the words:

"For my part, I do not see any other way [than to pass the British resolution] of testifying to the interest which the powers have in this question. If it was not ripe in 1899, it is not more so in 1907. Noth-

ing has been done in the matter, and the conference is quite as little prepared to deal with it to-day as it was then. Any fruitless discussion of it will only be injurious to the cause which we have had in view, by accentuating differences of judgment on matters of fact, whereas there is a unity in general intentions which may some day find their realization.

"Hence it is, gentlemen, that the proposal which the British delegation has made to us to confirm the resolution passed by the Conference of 1899, in formulating again the desire which was expressed then, is the one which corresponds best to the present status of the question under consideration, as well as to the interest which we all have in seeing it led within that path where the unanimity of the powers alone can constitute a guarantee of its future promotion. And it will be an honor for the second Peace Conference to have aided its progress by a favorable vote. I can, then, only applaud the English initiative and urge you to vote for the adoption of the resolution which Sir Edward Fry has proposed to us by unanimous acclaim."

The resolution was then adopted by acclamation, and the question of armaments was answered, so far as the second Peace Conference was concerned.

X. WARFARE IN THE AIR

a. THE CONFERENCE OF 1899

Baron d'Estournelles de Constant, a delegate from France, — that country in which patriotism runs very high, — remarked during the debate on hurling projectiles or explosives from balloons, that "just as steam and electricity have done so much to diminish the importance of existing boundary lines, the invention of an aerial ship will annihilate them altogether." It has also been remarked that "it is probably the inventor, rather than the statesman or the clergyman, who will put an end to the present system of warfare on land and sea."

But it was neither the patriotic, or national, motive of preserving boundary lines between countries, nor the fear that the development of warfare in the air would make useless the great armaments on land and sea, which caused the conference to prohibit for five years "the hurling of projectiles or explosives from balloons or by other new analogous means." Nor was it the poetic desire that at least one of "nature's four elements," the air, should be protected from the fate which has overtaken earth, fire, and water, its use, namely, as the element of human warfare.

The motive which induced Russia to propose, and the conference to adopt, the prohibition, was claimed by both sides in the debate to be a purely humanitarian one.

One view of the humanitarian phase of the question was expressed by General Poortugael, of the Netherlands, who said:

"I know well that when it is necessary to make war, it should be made as energetically as possible; but that does not imply that every means should be permitted. . . . Now, the progress of science, of chemistry in particular, is such that things quite incredible yesterday are realities to-day. We can foresee the use of projectiles, or other things filled with deleterious gas and soporifics which, hurled down from balloons into the midst of troops, would disable them at once. Since such attacks can not be guarded against, they resemble treachery; and all that resembles treachery should be scrupulously eliminated. Let us be chivalrous even in the manner of making war!"

Colonel Gilinsky, of Russia, said that "in the opinion of the Russian government the various means of injuring the enemy at present in use are sufficient"; and General Mounier, of France, added that "projectiles launched from balloons now might make victims of non-combatants."

Under the influence of this humanitarian argument, the subcommission voted almost unanimously for the permanent prohibition of balloons for military purposes. But one week later, Captain Crozier, of the United States, moved that the prohibition be limited to five years, and based his motion on the following argument, which he called a humanitarian argument, while questioning the logic, from a humanitarian standpoint, of a permanent prohibition.

"It seems to me difficult," said he, "to justify by a humanitarian motive the prohibition of the use of balloons for the hurling of projectiles or other explosive materials. We are without experience in the use of arms whose employment we propose to prohibit forever. Granting that practical means of using balloons can be invented,

who can say that such an invention will not be of a kind to make its use possible at a critical point on the field of battle, at a critical moment of the conflict, under conditions so defined and concentrated that it would decide the victory, and thus partake of the quality possessed by all perfected arms of localizing at important points the destruction of life and property and of sparing the sufferings of all who are not at the precise spot where the result is decided. Such use tends to diminish the evils of war and to support the humanitarian considerations which we have in view. I do not know of machines thus efficient and thus humanitarian, in the incomplete stage of development in which aerostation now is; but is it desirable to shut the door to their possible introduction among the permitted arms? In doing so, would we not be acting entirely in the dark, and would we not run the risk of error inherent in such a manner of procedure? The balloon, as we know it now, is not dirigible; it can carry but little; it is capable of hurling, only on points inexactly determined and over which it may pass by chance, indecisive quantities of explosives, which would fall, like useless hailstones, on both combatants and non-combatants alike. Under such conditions it is entirely suitable to forbid its use, but the prohibition should be temporary and not permanent. At a later stage of its development, if it be seen that its less desirable qualities still predominate, there will still be time to extend the prohibition; at present let us confine our action within the limits of our knowledge."

Captain Crozier had at first voted for the permanent prohibition in the subcommission, and was thus enabled to move its reconsideration; but the president of the subcommission ruled that the question should now be sent to the commission as a whole. In the commission, Captain Crozier repeated his motion and argument, adding that existing balloons might injure inoffensive populations as well as combatants, and destroy a church as well as a battery; but that perfected balloons might diminish the length of a war, and consequently its evils, as well as the expenses caused by it. The representatives of France

and Great Britain supported this argument, and after Colonel Gilinsky, of Russia, had failed to carry a prohibition of ten years, the commission unanimously adopted Captain Crozier's motion for a prohibition of five years duration. This prohibition was adopted unanimously by the conference at its session on July 21, and became one of the three prohibitive declarations appended to the Final Act.

b. THE CONFERENCE OF 1907

The five years prohibition of the use of balloons, imposed by the first conference, expired July 29, 1904. Before and after that date, there were various evidences that the development of the use of balloons had made noteworthy progress. While the second conference was in session, there came reports to The Hague that in Germany a dirigible balloon, with a speed of thirty miles an hour, had made a successful ascent; that in France the air ship "La Patrie," made in the shape of a cigar, dirigible at will, and having a speed of thirty-one leagues an hour with the wind and eighteen leagues against the wind, had maneuvered successfully at the military review of Longchamps; that the French prime minister and minister of war had spent two hours in "La Patrie," sailing, or flying, at will around Paris, and had determined to organize a corps of military aerostats to be associated with the forts on the German frontier. And it was freely predicted that within four or five years the air would be as full of air ships as the streets are now of automobiles.

In the midst of such reports and predictions (August 7), the first subcommission of the II Commission took up the discussion of the proposition made by the Belgian

delegation to renew the prohibition of 1899 for another period of five years. Lord Reay, of Great Britain, supporting this proposition, said that two elements, the earth and the sea, are quite sufficient for warlike operations; the air should be left free. . . . "What purpose will be served," he asked, "by the protective measures already adopted [for war on land], if we open to the scourge of war a new field more terrible perhaps than all the others?"

The Russian and Italian representatives proposed that a *permanent* prohibition be placed upon the bombardment, by air ships, of unfortified towns and cities; but this proposition was decided to have been already included within the laws and customs adopted for war on land, and it was accordingly withdrawn. The French delegation argued that the said laws and customs made unnecessary *any* regulation concerning warfare in the air. But the Belgian proposal to renew the prohibition of 1899 for five years was supported by the representatives of Austria, Turkey, Greece, Portugal, and China, and it was adopted in the subcommission by a vote of twenty-nine to six, and in the commission without being submitted to a vote.

In the plenary session of the conference, on the 17th of August, Great Britain's delegation offered the amendment, to the Belgian proposition, that the prohibition be extended "until the end of the third Peace Conference." This amendment was accepted by a vote of twenty-eight to eight (with eight abstentions); and then the prohibition was adopted by a vote of twenty-nine to eight (with seven abstentions).[1]

[1] The negative vote was cast by Germany, Argentina, Spain, France, Montenegro, Persia, Roumania, and Russia. The seven abstentions were: Chili, Colombia, Japan, Mexico, Peru, Sweden, and Venezuela.

The Japanese delegation explained that its abstention from the vote was due to the lack of unanimity on the question among the great military powers, and said that it did not see much use in binding itself as regards some powers, while as regards the others it would be necessary to continue to study and perfect the means of warfare in the air. In accordance with this interpretation of the conference's vote the air ship will have at least seven years to show what it can do. If it should prove itself thoroughly efficient, it seems probable that it will be admitted as an engine of warfare, as well as of communication and espionage. Should this prove to be the case, dire predictions are made as to its political, financial, and military results. One eminent prophet has said that before it boundaries and nationalities would be obliterated, forts and custom houses would become useless. From the financial point of view, it is urged that when the transportation of dutiable goods is made by balloons, governments can no longer depend upon customs dues in time of war, and that then their war budgets will be more directly felt and more bitterly resented than at present; that, although the cost of constructing a balloon is relatively small — about $50,000, — the manufacture of shells for combating them will have to be developed, and they themselves will become more and more expensive through the introduction of new means of ascending higher and flying faster in order to avoid the shells. Thus, financially, the result of air war ships would be both to increase enormously the cost of armaments and to diminish the sources of revenue for supplying it. From the military point of view, it is urged by a German lieutenant colonel that air war ships would make war "more bloody and infernal

than it is at present"; that "frightful ravages would be wrought where their projectiles strike"; that "soldiers would dream of being exposed constantly, even during the night, to a death-dealing rain, and great panics would ensue; and that hence it is above all the moral effect of such arms which should form the chief objection to their use." One eminent Austrian statesman has gone still farther in this military critique, and has predicted that "all the armaments in the world would be rendered obsolete by the advent of war ships in the air."

Whether or not these and similar arguments will be used in the next conference in favor of renewing, or making permanent, the prohibition of balloons as war ships, or of recognizing them as regular engines of warfare, will depend, of course, upon the progress made in aerostatics during the next seven years; but even now it may be assumed that the subject will become of increasing importance in each recurring conference.

The United States delegation took no part, in the Conference of 1907, in the discussion of the question, but voted with the majority, in both subcommission and conference, in favor of the temporary prohibition. Professor Renault, of France, repeated the arguments used in 1899 by Captain Crozier, of the United States, in favor of a temporary as against a permanent prohibition. The French delegation, however, opposed any other restriction on warfare in the air than had been adopted for warfare on the land. And this opposition probably caused a negative vote to be cast in the conference by the German delegation, which had voted in the subcommission in favor of the temporary prohibition on condition that the affirmative vote should be unanimous.

XI. WARFARE ON THE SEA

A. NEW ARMS AND METHODS

a. The Conference of 1899

The second topic mentioned in the Russian programme of January 11, 1899, was "the prohibition of the use in armies and fleets of any new kinds of firearms whatever, and of new explosives, or any powders more powerful than those now in use, either for muskets or cannon." When this topic came up for discussion in the naval subcommission of the I Commission, the first difficulty which arose was as to the precise meaning of the term "new kinds of firearms." Captain Schéine, of Russia, answered this question by saying that "the term should be understood in the sense of an entirely *new type*, and should not include transformations and improvements." But to this it was objected by Admiral Péphau, of France, that "a new type" — of cannon, for example — was merely an old type gradually modified and improved. Again, it was asked, by Captain Sakomoto, of Japan, if "new type" included one already invented, but not yet adopted. And, finally, the term "prohibition" was objected to as being inadmissible; for, if it was to be applied to the invention and construction of such engines of warfare, it could be enforced — if at all — only by a law of each nation; and if it was to be applied to the introduction of such arms from abroad, it would be an infringement on national sovereignty.

Captain Schéine replied to the last objection that the prohibition was to be only a temporary one, for say three or four years; and that, since it was not very probable that arms in general would be greatly modified during that time, the governments could use the opportunity for looking further into the question and deciding upon some definite line of action.

The Russian proposal was urged on the twofold ground of economy, — the reduction of warlike expenditures, and humanity, — the alleviation of the horrors of warfare.

To these arguments it was replied, by Admiral Fisher, of Great Britain, that each country desires to equip itself with the best arms that it can procure; that such arms tend to shorten and to prevent wars; and that a restriction on the invention and construction of new types of arms would place civilized peoples in a disadvantageous position in time of war with nations less civilized or with savage tribes. In the military subcommission, the argument was also made on the economic phase of the question by General Poortugael, of the Netherlands, that a new invention might occasion, not greater expense, but economies of various kinds; he added, however, that in case an international agreement could be reached, the Netherlands would willingly join in it.

The United States delegation says of this general subject, in its final report to the government:

"The American delegation approached the subject of the limitation of invention with much doubt. They had been justly reminded in their instructions of the fact that by the progress of invention as applied to the agencies of war, the frequency and indeed the exhausting character of war had been as a rule diminished rather than increased. As to details regarding missiles and methods, technical

and other difficulties arose which obliged us eventually to put ourselves on record in opposition to the large majority of our colleagues from other nations on sundry points. While agreeing with them most earnestly as to the end to be attained, the difference in regard to some details was irreconcilable. We feared falling into worse evils than those from which we sought to escape."

Captain Mahan, the United States representative on the naval subcommission, was a good exponent of this optimism as to the possibilities of "Yankee inventiveness" and of "Yankee caution," and shared in the criticism of the Russian proposal as to "new arms."

1. *Marine Cannon*

The subcommission, being unwilling to express its opinion on an indefinite question, however important it might be, requested Captain Schéine to define precisely what "new arms" were implied by the Russian proposal. This he did by taking up, first, the question of marine cannon. After describing the various types of cannon, he proposed that the powers should agree for a period of three or five years (each power to fix the beginning of the period) to limit the caliber of ordinary guns to seventeen inches (43 cm.), and of rapid-firing guns to eight inches (20 cm.); their length to forty-five calibers; and the initial velocity to three thousand feet a second (914 m.). Captain Mahan having made the remark that if calibers are to be limited, armor also should be restricted, Captain Schéine proposed that the maximum thickness of armor should be fourteen inches (355 mm.) according to the latest Krupp pattern. After a discussion of these propositions, and a restatement by various delegates of much the same objections which they had made to the restriction

of "new arms" in general, it was agreed that the delegates should inform their governments of the Russian proposals, and await their instructions. Captain Mahan said that, although he was willing to consult his government, he did not believe that the United States would be inclined to restrain inventions, especially those related to the perfecting of armor plate.

Admiral Péphau, of France, thinking that an agreement might be secured upon a general statement, if not on a specific restriction, proposed that the governments should agree not to introduce within a certain time "a *radical* transformation in existing types, such as that from a muzzle-loading to a breech-loading cannon"; and that, "in any case, the calibers at present in use shall not be increased." Of the fourteen votes cast on this proposition, however, seven were for, and seven against; the affirmative were chiefly those of the small powers, and the negative chiefly those of the large powers, including the United States. This compromise was, accordingly, rejected; and, after some of the governments had been heard from, a vote was taken on the specific proposals of Russia, with the result that of ten votes cast, seven were for and three agansit them.[1] When this result was reported to the commission, that body voted unanimously to leave the question open and to recommend it to the serious study of the governments; and the conference adopted this recommendation unanimously, with the exception of a few abstentions.

[1] Those voting aye, on condition of unanimity, were: Russia, Austria-Hungary, Sweden and Norway, Japan, the Netherlands, Roumania and Siam; those voting no were: United States, Germany, Italy.

2. *Explosives and Asphyxiating Gases*

The Russian programme included, next, the prohibition of "new explosives, or any powders more powerful than those now in use." When this topic was taken up in the naval subcommission, M. Rolin, delegate from Siam, objected to the proposal because "the employment of explosives, particularly for the small powers, constitutes a special means of defense." Admirals Fisher, of England, and Péphau, of France, also objected to the prohibition for the same reasons as were urged in the case of "new arms"; and after his defeat on this latter question, Captain Schéine, of Russia, did not press his plan regarding new explosives, but cleverly substituted for it a proposal to prohibit the use of "projectiles charged with explosives which diffuse asphyxiating or deleterious gases." When Count Soltyk, of Austria-Hungary, objected to this phraseology because "all explosives contain gas more or less injurious," Captain Schéine defined the prohibition to "include only those projectiles whose object is to diffuse asphyxiating gases, and not to those whose explosion produces incidentally such gases."

The representatives of Russia, Denmark, France, Austria-Hungary, Great Britain, and Portugal supported this proposal, making the following arguments: the task of the conference being to restrict the means of destruction, it is logical to prohibit *new* means, above all when they have (as have such projectiles) a barbarous character and partake of treachery and cruelty similar to the poisoning of drinking water; directed against a besieged city, they would destroy more non-combatants than ordinary projectiles; death from asphyxiation is more

cruel than death from bullets; means should be sought for putting enemies out of the battle, but not out of this world.

As a result of these arguments, the prohibition was voted in the subcommission, unanimously, with the exception of the vote of the delegate from the United States, which was cast against it. Captain Mahan carried his struggle to permit the use of such gases through the subcommission, commission, and conference. In defense of his action, he made the following report to the United States government:

"As a certain disposition has been observed to attach odium to the view adopted by this Commission [*i.e.* the United States delegation] in this matter, it seems proper to state, fully and explicitly, for the information of the Government, that on the first occasion of the subject arising in Subcommittee, and subsequently at various times in full Committee, and before the Conference, the United States naval delegate did not cast his vote silently, but gave the reasons, which at his demand were inserted in the reports of the day's proceedings. These reasons were, briefly: 1. That no shell emitting such gases is as yet in practical use, or has undergone adequate experiment; consequently, a vote taken now would be in ignorance of the facts as to whether the results would be of a decisive character, or whether injury in excess of that necessary to attain the end of warfare, the immediate disabling of the enemy, would be inflicted. 2. That the reproach of cruelty and perfidy, addressed against these supposed shells, was equally uttered formerly against firearms and torpedoes, both of which are now employed without scruple. Until we knew the effects of such asphyxiating shells, there was no saying whether they would be more or less merciful than missiles now permitted. 3. That it was illogical, and not demonstrably humane, to be tender about asphyxiating men with gas, when all were prepared to admit that it was allowable to blow the bottom out of an iron-clad at midnight, throwing four or five hundred into the sea, to be choked by water, with scarcely the remotest chance of escape. If, and when, a shell emitting asphyxiating gases alone has been successfully produced, then, and not before, men will be able to vote intelligently on the subject."

In the meeting of the commission to which the result of this discussion was reported, the president, M. van Karnebeek, of the Netherlands, made an urgent appeal to the United States delegation to make the vote against asphyxiating gases unanimous, and said that six of the countries voting aye had done so only in case of unanimity. But Captain Mahan replied that it was "impossible to change his first vote, because it was based on a question of principle."

In the session of the conference, when the question was finally disposed of, the United States voted no, and Great Britain cast the same vote, unanimity not having been secured; but all the other countries voted for the prohibition, and the conference adopted the following declaration:

"The Undersigned, Plenipotentiaries of the Powers represented at the International Peace Conference at The Hague, duly authorized to that effect by their Governments, inspired by the sentiments which found expression in the Declaration of St. Petersburg of the 29th November (11th December), 1868, declare as follows: The Contracting Powers agree to abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases."

This declaration was signed by the delegations of all the twenty-six countries represented, with the exception of those of the United States and Great Britain.

In defense of Captain Mahan's stand on this question, the following paragraph from the United States secretary of state's instructions to the delegation may be noted: "It is doubtful if wars will be diminished by rendering them less destructive, for it is the plain lesson of history that the periods of peace have been longer protracted as the cost and destructiveness of war have increased. The expediency of restraining the inventive genius of our peo-

ple in the direction of devising means of defense is by no means clear, and, considering the temptations to which men and nations may be exposed in a time of conflict, it is doubtful if an international agreement of this nature would prove effective."

On the other hand, it should be noted that our delegation was not united in its opposition to the prohibition of asphyxiating bombs. Ambassador White, the leader of the delegation, recorded in his diary at the time of the discussion of the question: "To this [Captain Mahan's argument] it was answered — and, as it seemed to me, with force — that asphyxiating bombs might be used against towns for the destruction of vast numbers of non-combatants, including women and children, while torpedoes at sea are used only against the military and naval forces of the enemy. The original proposal was carried by a unanimous vote, save ours. I am not satisfied with our attitude on this question; but what can a layman do when he has against him the foremost contemporary military and naval experts? My hope is that the United States will yet stand with the majority on the record."[1]

It should be noted, also, that in the Conference of 1907, Great Britain's first delegate, Sir Edward Fry, announced that his government, desirous of promoting the utmost possible unanimity among the nations, had instructed him to accept the declaration of 1899 against the use of asphyxiating gases. Since the governments of South and Central America, for the first time represented in 1907, had already accepted the acts of 1899, Great Britain's adhesion to the above declaration left the United States government alone in opposition to it.

[1] Andrew D. White, "Autobiography," II, 319–320.

3. *Torpedo Boats and Rams*

The Russian proposal on this topic was: "A prohibition of the use, in naval warfare, of submarine torpedo boats or plungers, or other similar engines of destruction; an agreement not to construct, in the future, vessels with rams."

The president of the naval subcommission opened the discussion of the question as to torpedo boats with the remark that "if one nation should adopt these terrible engines of war, all others should be left free to make use of them also." The delegates of Great Britain, Germany, Russia, Japan, Italy, and Denmark said that their countries would vote for the prohibition, but only in case unanimity could be secured. Captain Mahan, of the United States, said that he wished to leave his government in entire liberty to make use of such boats, but would await the decisions of the other delegates. Austria-Hungary's delegate believed that they should be permitted for the defense of seaports and roadsteads; the delegate of France believed that the submarine torpedo has an eminently defensive object and should be permitted; and the delegates of the Netherlands, Siam, and Sweden and Norway supported this conclusion for the reason that the submarine torpedo is the rightful weapon of the small and feeble. This difference of opinion being so great, neither the subcommission, commission, nor conference attempted to express any formal resolution on the use of torpedo boats.[1]

The construction of war ships with rams was another question which failed to receive a definite answer. It was

[1] In the commission, a vote was taken on the Russian proposal, ten states voting for it, and nine against it; the United States voted against it.

argued that the prohibition could not extend to ships already made, nor to ships contracted for and under construction; nor could it be properly held to apply to a war ship which is not provided with a ram, but is strengthened at the bow in such a manner as to give and sustain a shock. Captain Hjulhammar, of Sweden and Norway, argued that by suppressing the ram and not the torpedo boat but little would be done in the cause of humanity; and that the ram is useful against transports in case of disembarkation, — a matter of importance to states having a long extent of coast. And M. de Bille, of Denmark, argued that the ram constitutes a useful means of defense, and offers to small ships their only chance of defeating large ones.

Captain Schéine, of Russia, having failed to secure any agreement as to the construction of ships with rams, proposed that in time of peace the rams on war ships should be masked, so as to reduce the danger from them to other ships in case of collision. But on this proposal the argument was made that means of masking rams are as yet but too little developed; and although the subcommission reported the question to the commission, which alone was competent to deal with it, no action was taken upon it.

Captain Mahan was one of those who argued against the subcommission's competency to deal with the masking of rams; but in the commission the United States was one of the seven states that voted for the prohibition of the construction of ships with rams, on condition that the vote should be unanimous.[1]

[1] These states were: The United States, Great Britain, Italy, Japan, Persia, the Netherlands, and Roumania; four others voted for the prohibition

b. The Conference of 1907

The Russian programme for the second conference contained no reference to "new kinds of firearms." This is not surprising, considering the decided rejection of Russia's proposals concerning them in 1899; and considering also the fact that it omitted from its programme for 1907 its entire armament policy, of which new arms, marine cannon, etc., formed a part. But, with the statement that "it is desirable at present to examine only those questions which are especially pressing, those, namely, which have arisen from the experience of the years just past," the programme specified the three questions of submarine mines, naval bombardment, and the transformation of merchant ships into cruisers, as requiring an international agreement.

1. *Submarine Mines*

The placing of torpedoes, or the use of submarine mines, was made prominent by the Russo-Japanese War; and the question of regulating it was considered by several of the great naval and maritime powers to be an urgent one.

When it came up for discussion in the first subcommission of the III Commission, the subcommission's president declared that its solution presented greater technical difficulties than any other question before the conference; but that if such solution could be reached, it would prove most valuable in the promotion of humanity and peace.

without reserve: France, Greece, Siam, and Bulgaria; and seven states voted against it: Germany, Austria-Hungary, Denmark, Spain, Portugal, Sweden and Norway, and Turkey.

The basis of discussion was Great Britain's propositions that the use of unanchored, or floating, submarine contact mines should be forbidden; that the use of such mines as do not become harmless when breaking loose from their anchorage should be prohibited; that the use of mines to establish or maintain a commercial blockade should be prohibited; that belligerents should be permitted to use mines only in their own or their enemies' territorial waters, or at a distance of ten miles in front of naval forts.

Captain Ottley, of the British navy, supported these propositions in a speech in which he showed the great danger of the indiscriminate sowing of the high seas with floating mines, to human life and to the commerce of neutral nations. The Chinese delegates supported the British propositions on the ground of a "large humanity," and emphasized their support by citing some consequences to their country of the Russo-Japanese War. They stated that their government was still obliged (two years after the close of that war) to furnish its coasting vessels with special instruments to remove and destroy the floating mines which encumber not only the high seas but also its own territorial waters; that, in spite of every precaution, a very considerable number of coasting ships, fishing boats, junks, and sampans, have foundered as a result of striking these mines; and that from five to six hundred Chinese citizens, peacefully pursuing their occupations, have suffered a cruel death from these dangerous engines of warfare.

Several other delegations admitted the truth of Captain Ottley's arguments, but proposed various amendments to the British propositions. The Italian and

Japanese delegates proposed that, instead of prohibiting floating mines altogether, as the first British proposition required, a belligerent should have the right of using floating mines which should become harmless "within one hour after they are launched," or "after a duration of submersion restricted in such a way as to present no danger to neutral vessels outside the immediate sphere of hostilities." The delegations of the Netherlands and Brazil demanded that the right of using anchored mines be accorded to neutrals for the purpose of defending their neutrality, as well as to belligerents. And Admiral Siegel, of Germany, insisted that, instead of restricting belligerents in the use of mines to their own or each other's territorial waters, they should be permitted to use them also on the "theater of war"; that is, on the space of sea on which a warlike operation is being carried out, or has just been carried out, or on which such operation may result from the presence or the approach of the armed forces of the two belligerents.

After a prolonged discussion of the subject in its various phases, it was referred to a committee of twenty-four delegates, representing chiefly the countries which had presented propositions in regard to it.[1]

This committee, after six weeks of discussion, appealed to the III Commission to know if that commission, or even the conference itself, was competent to restrict the use of mines by neutral nations. An animated debate on this question arose in the commission, which decided that it was competent to impose such restriction. After

[1] The United States delegation had presented a proposition, similar to the first two British propositions, designed to protect the commerce of neutral nations; Admiral Sperry, U.S.N., was appointed on the committee.

three more weeks of discussion, the committee presented a voluminous report which touched upon various phases of the subject and stated that, in spite of the great difficulties connected with it, certain principles had been unanimously accepted by the committee and certain rules for applying those principles had been adopted by a majority vote. The principles unanimously accepted were few but important, and were stated as follows: a fundamental distinction must be made between automatic contact mines which are anchored, or cabled, and those which are not cabled; the latter may be used anywhere, but they should be so constructed as to become harmless within an extremely short lapse of time; the same is true, also, of automobile torpedoes which have missed their aim. As to cabled mines, it is necessary to restrict their use within certain places; but since this restriction can not be absolute, and since it can not preclude the possibility of placing them in places where peaceful navigation should be able to count on free access, it is necessary to restrict cabled mines also within a limit of time during which they may continue dangerous. And, finally, every cabled mine should be so constructed as to become harmless as soon as it breaks loose from its cables.

Upon these principles the majority of the committee based a series of special rules, which were recommended to the commission. In the long debate upon these rules, within the commission, the delegates from the United States, Great Britain, and Japan argued that they were not sufficiently restrictive; while two delegates from Germany insisted that they went too far in the direction of crippling the warlike efficiency of small fleets. Concessions were made by both sides in the debate, and the

rules finally adopted received the unanimous vote of the thirty-eight delegations present when the vote was taken.[1]

The conference, also, adopted these rules unanimously, except that eight delegations reserved their votes on parts of them. They forbid: first, the use of unanchored mines, unless constructed in such a manner as to become harmless within one hour after their control has been lost;[2] second, the use of anchored mines which do not become harmless as soon as they break their cables; third, the use of torpedoes which do not become harmless when they have missed their aim; fourth, the placing of mines along the coasts and in front of the ports of the enemy, with the sole purpose of intercepting commerce.[3] They provide, also, that every possible precaution shall be taken to protect peaceful navigation from mines, the belligerents agreeing, whenever possible, to cause them to become harmless after a limited time and, when they cease to be guarded, to indicate the dangerous regions and inform the governments of them, as soon as military exigencies permit. Neutral governments which place mines along their coasts are subjected to the same rules as are belligerents. At the end of a war, both belligerents are required to remove the mines which they have planted, both on their own and the enemy's coasts, as well as elsewhere. All the contracting powers agree to transform, as soon as possible, their mining materials into the perfected types necessitated by the above rules; and the rules themselves

[1] There were six absences: Chili, Dominican Republic, Luxemburg, Nicaragua, Panama, and Paraguay.

[2] Dominican Republic, Mexico, Montenegro, Russia, Siam, and Turkey reserved their vote on this rule.

[3] Germany and France reserved their vote on this rule.

are to remain in force for seven years, and longer unless repudiated in a prescribed manner.

The disappointment of the British delegation that the rules adopted were not more radical was voiced by Sir Ernest Satow, who, in a plenary session of the conference, made the following statement:

"Having voted for the Convention on Mines which the conference has just adopted, the British delegation desires to assert that it can not consider this arrangement as definitively solving the question, but as marking only one step in international legislation on the subject. It believes that there has not been sufficient regard for the right of neutrals to protection, nor for the sentiments of humanity which can not be neglected; it has done its utmost to induce the conference to adopt this view, but its efforts in this direction have been futile.

"The high seas, gentlemen, are a great international highway. If, in the present state of international laws and customs, belligerents are permitted to settle their disputes on it, it is none the less incumbent upon them to do nothing which, long after their own departure from the scene of conflict, might make this highway dangerous for neutrals who have an equal right to its use. We declare, without hesitation, that the right of neutrals to security in navigating the high seas should take precedence of the transient right of belligerents to make use of them as the place of warlike operations.

"But the convention which has been adopted does not impose upon the belligerent a single restriction as to the placing of cabled mines wherever it may seem to him desirable, whether it be in his own territorial waters for purposes of defense, or in those of the enemy for purposes of attack, or, finally, in the high seas, thus necessarily causing great risks to neutral navigation in time of naval warfare and, indeed, the probability of disasters. We have already insisted, several times, on the danger of such a condition; we have been obliged to point out what might be the consequences of the loss of some great steamboat belonging to a neutral power. We have not failed to advance every argument in favor of restricting the field of action of these mines, and particularly to emphasize the advantages which the whole civilized world would derive from such a measure, since it would

diminish, to a certain extent, the causes of armed conflict. It has seemed to us that the adoption of the proposition made by us at the beginning of the discussion would have prevented the dangers which, in every future naval war, will threaten to disturb peaceful relations between neutrals and belligerents. But, since the conference has not partaken of our way of thinking, it remains for us to declare in the most formal manner that those dangers exist and that it is due to the incomplete state of the present convention that they will make themselves felt in the future. This convention, being as it is, in our opinion, only a partial and insufficient solution of the problem, it can not be considered, as I have said before, a complete exposition of international law on the subject; and the legitimacy of such or such act can not be assumed simply because this convention has not prohibited it. This is the principle which we desire to assert, and which can never be ignored by any state, whatever may be its power."

Baron Marschall von Bieberstein, of the German delegation, immediately replied to Sir Ernest Satow as follows:

"In view of the declaration just made by the honorable delegate from Great Britain, I desire to repeat what I have said already in the commission: 'A belligerent who sinks mines assumes very heavy responsibility towards neutrals and towards peaceful navigation. On this point we are all agreed. No one will resort to this weapon without absolutely urgent military reasons. Now, military operations are not controlled solely by the prescriptions of international law. There are other factors; conscience, good sense, and the sentiment of duties imposed by the principles of humanity will be the surest guides for the conduct of sailors, and will form the most effective guaranty against abuses. The officers of the German navy — I proclaim it aloud — will always fulfill in the strictest manner the duties prescribed by the unwritten law of humanity and civilization.

"'I need not tell you that I recognize entirely the importance of codifying rules to be followed in war. But we should avoid the promulgation of rules whose strict observance may be rendered impossible by the force of circumstances. It is of the first importance that the international maritime law which we desire to enact should contain only those clauses whose enforcement is possible from the

military point of view, — even under exceptional circumstances. Otherwise, the respect for law will be diminished and its authority destroyed. Hence it seems to us preferable to maintain for the present a certain reserve, in expectation that within five years we shall be in a better position to find a solution acceptable to every one.'

"As to sentiments of humanity and civilization, I can not admit that any government or nation is in this sense superior to that which I have the honor to represent."

With this exchange of views between the chief naval and the chief military power of Europe, the conference passed finally from the subject of submarine mines.

2. *Naval Bombardment*

A proposition was made in the Conference of 1899 that the rule adopted for land warfare as to the bombardment of undefended cities, etc., should be extended to naval warfare also. But it was decided that the question was too complicated to be solved at that time, and the conference contented itself with passing, unanimously,[1] a desire [*vœu*] that it be referred to the consideration of a later conference.

It was mentioned, as has been said, in the Russian programme for the second conference, and was assigned to the first subcommission of the III Commission. Its consideration was postponed until after the discussion of the question of submarine mines; but at the first session of the subcommission it was introduced by the United States delegation, which proposed that the bombardment, by a naval force, of unfortified and undefended towns, villages, or buildings, be prohibited. This prohibition

[1] The British delegation refrained from voting, because of lack of instructions.

included bombardment for non-payment of ransom; but the proposition admitted that such towns, villages, or buildings are liable to bombardment (after due notice) when reasonable requisitions for provisions and supplies essential to the naval force at the time of the requisition are withheld. And it also admitted that such places are liable to the damages incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port.

This proposition was taken as the basis of discussion, and, although amended in several particulars, its substance was adopted by the conference and embodied in some important rules. By unanimous vote, the bombardment of undefended ports, towns, villages, dwellings, or buildings was prohibited. A difference of opinion arose, however, as to the precise meaning of the term "undefended." General Poortugael, of the Netherlands, insisted that an unfortified town situated near a coast defended by soldiers and cannon (The Hague, for example) should be considered an "undefended" town. This argument was informally acquiesced in, but it was not deemed possible to formulate a precise definition of the term. It was definitely voted, however, that a place may not be bombarded even though defended by automatic submarine mines of contact anchored before its port. This last proviso was vigorously opposed by Captain Ottley, of Great Britain, who argued that a submarine mine is as much of a defense as are cannon; that the fire of a cannon can rarely destroy a vessel in the offing, whereas the explosion of a single mine will certainly do so; that it is in the interests of all neutral countries to free the sea of these murderous instruments, since, being

entirely concealed, they are equally dangerous to friends and enemies, neutrals and non-combatants; that, if ports are undefended otherwise than by submarine mines, they are immune from bombardment and hence do not need the mines to protect them; and that it would be an outrage upon a belligerent, approaching a so-called undefended port, to be destroyed by a mine belonging to the port which claimed inviolability for itself.

This line of argument induced six delegations[1] to reserve their votes on the proviso; but the argument that a submarine mine was only a passive instrument of destruction, and would be made harmful to the belligerent only when he himself approached it, was accepted as conclusive by a large majority of the delegations, all of which, with the exception of the six referred to, voted for the proviso.

It was also voted, unanimously and without discussion, that the bombardment of undefended ports, etc., for the non-payment of requisitions of money, should be prohibited; and that pillage, even of those towns taken by assault, should also be prohibited.

In the case of those ports, etc., which contain military works, military or naval establishments, depots of arms or materials of war, workshops and plants capable of being utilized for the needs of a fleet or army, or whose harbors contain war ships, the commander of a naval force may demand the destruction of these things by the local authorities within a reasonable time, and if this demand is not complied with and no other method of destroying them is possible, he may then destroy them by bombardment. The proviso that a "reasonable time"

[1] Great Britain, Germany, France, Spain, Japan, and China.

must be given to the local authorities before the bombardment is begun, was vigorously opposed by Captain Ottley, of Great Britain, for the reason that a fleet anchored within the harbor of an undefended port might profit by any delay to procure reënforcements and thus avoid destruction or even achieve a victory. The naval delegates of various countries supported this view of the matter, and it was decided to adopt the further proviso that if military exigencies require immediate bombardment, and do not admit of according a delay, the bombardment may take place at once, but that the commandant of the bombarding fleet must take all requisite measures to cause the unfortified city itself to suffer the least possible inconvenience. This proviso was adopted by a unanimous vote, with the exception of that of Haiti's delegation, which reserved its vote upon it for the reason that "it seems very rigorous indeed to admit that even the unexpected presence, within an undefended port, of war ships which the enemy might think should be destroyed, is sufficient to expose the town and its inhabitants to the results of an unexpected and immediate bombardment." [1]

It was further conceded [2] that if the local authorities of undefended ports, etc., refuse to comply with a formal demand for stores or provisions necessary to the present needs of the naval force near it, then, after express notification, the commander of the said force may proceed to a bombardment. The Spanish delegation proposed that these stores or provisions should be paid for at current

[1] M. van den Heuvel, of Belgium, also opposed this proviso, and voted against it, in the commission; but in the conference, Belgium's vote was cast for it.

[2] By unanimous vote, except that Chili's delegation reserved its vote.

prices, and that they should be limited to the quantity which can be demanded in a neutral port. The last of these propositions failed of adoption; but it was provided that such stores or provisions may be requisitioned only with the sanction of the commandant himself, and shall be paid for in cash, whenever possible, or vouched for, otherwise, by written receipts. On the motion of the Turkish delegation, it was also provided that such requisitions shall be in accord with the resources of the place on which they are made.

While conceding the right of bombardment of undefended ports, etc., under the exceptional circumstances stated above, the conference voted that every necessary measure shall be taken by the commandant of the bombarding force to save from injury, as far as possible, the buildings devoted to religion, art, science, and benevolence, historic monuments and hospitals, on condition that they are not used at the time for a military purpose. It was made the duty of the inhabitants of a bombarded town to designate such buildings by visible signs, consisting of large, stiff, rectangular panels, divided diagonally into two colored triangles, the upper one black and the lower one white.

3. *Merchant Ships transformed into Cruisers*

This topic was mentioned in the Russian programme and was the first one assigned to the IV Commission. When it was taken up for discussion, seven propositions concerning it were presented by various delegations. None of these propositions suggested the abolition of the practice of transforming merchant ships into cruisers,

although Brazil's first delegate said that there is danger of its restoring in an indirect manner the system of privateering which the Declaration of Paris of 1856 prohibited. The Japanese delegation proposed that the transformation of fishing boats into war vessels be prohibited; and this prohibition was implied in the exemption later accorded to such boats from capture.

Lord Reay, on behalf of Great Britain, moved that every merchant ship, whether belligerent or neutral, which is employed in the transport of marines, land troops, munitions of war, combustibles, provisions, drinking water, or any other kind of naval supplies, shall be considered an "auxiliary war vessel" and treated as such; also that the same treatment should be accorded to any vessel designed to repair war ships, or to carry dispatches or transmit information, if the said vessel is obliged to conform to the sailing orders communicated to it directly or indirectly by a belligerent fleet. It was obvious that this proposition raised the question of the definition of "contraband of war," and that it provided for a kind of involuntary and unofficial transformation of merchant vessels into war ships. It was therefore vigorously combated on both these grounds, and Lord Reay finally withdrew it from further consideration by the existing conference, saying that it should be submitted to the next conference after a careful study of the question by the various governments, and that meanwhile such vessels would be subject, as rendering "hostile assistance," to the principles of international law.

The Japanese and the British propositions were the only ones which had to do with the question of *what* vessels may be transformed into war ships; and it was

unanimously agreed, by silent assent and without formal vote, that "in time of war, ships belonging to the merchant marine of any power may be incorporated in its war fleets." But it was also unanimously agreed, by formal vote, that "it is desirable to define the conditions under which this operation may be effected, in so far as the rules regarding it are generally accepted." The commission then entered upon a debate as to the *duration*, *place*, and *method* of the transformation.

Austria, supported by Germany, proposed that the transformation should be made for the entire duration of the war, and that a retransformation should not occur until the war had ended. This proposition was based on the argument that a ship should be all one thing or all the other, — a ship of war or a merchant ship, and that it should not be permitted to change its character, and with that, its responsibilities, at will. Against this, Japan urged that belligerents should not be hampered, in this matter, by too strict rules; and the majority adhered to this view and refused to enact any rule as to the duration of the transformation.

Italy, supported by Mexico, proposed that merchant ships should be forbidden to become war ships either in the waters of another state or on the high seas. But, while it was generally admitted that such transformation must not occur in the waters of a neutral state, it was argued by Germany and Russia that it should be permitted on the high seas. Belligerents transform *captured* merchant ships into war vessels on the high seas; why should they not transform their own merchant ships there also? Such was the argumentative question, which Great Britain answered by saying, first, that such a transformation is

an act of sovereignty, which can be accomplished only in those places where sovereignty can be exercised; and, second, that such transformation on the high seas would leave neutral nations in ignorance of the character assumed by a ship which had left its last port as a merchant vessel. France, in supporting the German view of the question, answered Great Britain's arguments by saying that a state has full sovereignty on the high seas over all the ships under its flag; and that neutral nations could easily be informed, and should immediately be informed, of the transformation by the belligerent publishing the vessel on its official list of war ships. Japan rejected both the German proposal to permit the transformation on the high seas, and the British proposal to restrict it exclusively to the home ports of belligerents; and proposed as a compromise to permit it in waters belonging to lands *occupied* by belligerents as well as in their own waters.

This discussion over the place of transformation was continued in a special committee which finally submitted the question to a vote, with the result that seven delegations favored the German proposal as to the high seas, and nine delegations followed England's lead against it. In view of the indecisiveness of this vote, the commission and the conference voted that "the high contracting parties not having been able to agree on the question, . . . it is understood that this question stands entirely apart and is not at all implicated in the rules adopted."

The rules adopted were six in number, and provided that a merchant ship transformed into a war ship can have the rights and duties pertaining to the latter only when it is placed under the direct authority, the immediate

control, and the responsibility of the state whose flag it flies; that such transformed ships should bear the distinctive external marks of the war ships of their nation; that their commanders should be in the service of the state and duly commissioned by the competent authorities; that their crews must be subjected to military discipline; that they themselves are bound, in their operations, to conform to the laws and customs of war; and that the belligerent to whom they belong should mention their transformation, as soon as possible, on the list of its war ships.

These rules were voted in the commission unanimously, with six abstentions, and in the plenary session of the conference by thirty-two ayes, one reservation,[1] nine abstentions,[2] and two absences.[3]

Before voting in favor of these rules the delegations of Spain and Mexico announced to the conference that their respective countries accepted the Declaration of Paris of 1856.

When the rules were voted in the commission, General Porter, on behalf of the United States delegation, said that the question of such regulation was of interest only to those states which had signed the Declaration of Paris; that the United States had not signed that declaration, because it did not recognize the principle of the inviolability of private property; and that therefore the United States delegation would abstain from voting on the proposed regulations.

[1] Turkey, whose delegation had received no instructions.

[2] United States, Colombia, China, Dominican Republic, Ecuador, Guatemala, Persia, Salvador, and Uruguay.

[3] Nicaragua and Paraguay.

B. THE GENEVA CONVENTION

1. Hospital Ships

a. The Conference of 1899

The document referred to generally as "The Geneva Convention," or "The Red Cross Rules," was called officially "The Convention of Geneva for the Improvement of the Condition of Soldiers wounded in Armies in the Field." It consisted of ten articles, agreed to by the representatives of twelve sovereigns,[1] and based on the desire expressed in its preamble, "to alleviate, in so far as they can, the evils inseparable from war, to suppress the useless hardships and improve the condition of soldiers wounded on the field of battle." It was due largely to the generous initiative of Switzerland, and was signed at Geneva by the representatives of the twelve sovereigns on the 22d of August, 1864.

Four years later, October 20, 1868, the representatives of fourteen sovereigns[2] adopted at a conference in Geneva fifteen additional articles. Five of these were amendments to the earlier articles, and the other ten were designed "to apply to fleets the advantages of the earlier convention."

It was to these articles that the fifth and sixth items of the Russian programme for the first conference referred

[1] These were the sovereign rulers of the Netherlands, Baden, Belgium, Denmark, Spain, France, Hesse, Italy, Portugal, Prussia, Switzerland, and Würtemberg.

[2] All of the former sovereigns were represented, with the exception of those of Spain, Hesse, Portugal, and Prussia; and in place of these, were representatives from the North German Confederation, Austria, Bavaria, Great Britain, Sweden and Norway, and Turkey.

in the words: "An application to naval warfare of the stipulations of the Geneva Convention of 1864, on the basis of the additional Articles of 1868; and a neutralization of ships and boats employed in saving drowning sailors during or after naval battles." But as only Articles VI to XV of the Convention of 1868 applied to naval warfare, these alone were taken up by the conference for discussion. This discussion was carried through a special committee of experts, a subcommission, the II Commission, and the conference; it lasted from May 25 to June 20, and was productive of some of the most useful results of the conference.

The first step was to admit, without opposition, that it was desirable to apply the Geneva articles to naval warfare. This step was in itself of marked importance; for the articles of 1868 had remained a dead letter, and the difficulties of their application were obviously so great that it seemed impossible to several of the naval powers to accomplish anything in this direction at the Conference of 1899. But thanks to the liberal and resolute policy of a few of the largest naval powers, the desirability of the step was admitted and the conference proceeded to take it.

The first difficulty was to define precisely the scope of the term "hospital ships." This term was given a generous scope and was made to include three kinds: 1. Military hospital ships, that is to say, ships constructed or assigned by states especially and solely for the purpose of assisting the wounded, sick, or shipwrecked.[1]

[1] The French word used here is *naufragés*, the nearest translation of which in English is *shipwrecked;* but it implies, not sailors wrecked by storm on coasts or rocks, but those who have been placed in danger of drowning as a result of naval combat.

2. Hospital ships equipped wholly or in part at the cost of private individuals or officially recognized relief societies, and belonging to one of the belligerent nations.

3. Hospital ships equipped wholly or in part at the cost of private individuals or officially recognized societies of neutral nations. In addition to these three kinds of hospital ships, strictly so called, neutral merchantmen, yachts, or other non-military vessels, having or taking on board sick, wounded, or shipwrecked belligerents, were also exempted from capture for so doing.

All of these four kinds of vessels are to be respected and exempt from capture, provided they fulfill certain conditions. The "military," or government, hospital ships must have their names communicated, before they are employed, to the belligerents; the private or semi-private hospital ships belonging to belligerent nations, or to neutrals, must have commissions from their governments, and their names must be communicated to the belligerents before they are employed. All three kinds of hospital ships must afford relief to the wounded, sick, and shipwrecked of the belligerents, irrespective of their nationality; they must not be used for any military purpose; they must not in any way hamper the movements of the combatants; they must act at their own risk and peril during and after an engagement; and the belligerents have the right to control and visit them, refuse their assistance, order them away, make them take a certain course, put a commissioner on board, or even detain them if important circumstances require it. And the neutral merchantmen and yachts are liable to capture for any violation of neutrality committed by them.

To distinguish hospital ships from war ships, as well

as to prevent their being used for military purposes, it was agreed that the "military," or government, hospital ships shall be distinguished by being painted white outside, with a horizontal band of green about one and a half meters wide; that the private or semiprivate hospital ships belonging to the belligerents or to neutrals shall be distinguished by being painted white outside with a horizontal band of red about one and a half meters wide; and that all hospital ships shall make themselves known by hoisting, together with their national flag, the white flag with a red cross provided by the Geneva Convention.

The discussion of these three questions — the meaning of "hospital ships," the restrictions imposed upon them, and their distinguishing signs — was an animated and interesting one. On the first point, Captain Schéine, of Russia, argued that by placing all hospital ships under the control of the admiral of one or the other of the belligerent fleets, the field of battle would not be invaded by ships of a private character. But, on the motion of M. Renault, of France, it was decided that private or semiprivate ships should be permitted, provided they were kept under the control of one or other of the belligerents. This was a very important decision, as it enables the hospital ships of the Red Cross Society and of other societies and individuals to participate in the work of rescue. The French delegates also prevented this participation from being restricted by a Russian proposal that all hospital ships should be constructed on such a model that they *could* not be used as ships of war; the French argument prevailed that the previous notice and other restrictions required of them would be sufficient to prevent fraud. It was also argued, by Captain Mahan, of the United

States, among others, that neutral hospital ships and merchantmen had been conceded a status and immunities hitherto unknown and not now justifiable; and Captain Mahan went so far as to say: "Upon reflection I am satisfied that no necessity exists for the authorization of hospital vessels under a neutral flag upon the scene of naval war, and that the adhesion of our government to such a scheme may be withheld without injury to any one." But this restricted policy was rejected in the interests of humanity.

On the other hand, no delegate proposed that a merchantman belonging to one of the belligerent powers, and having on board sick or wounded, should also be respected and exempt from capture; the committee reporting the resolutions commented on this fact as follows: "The consequence of this silence is that such ships remain under the rule of the common law, and hence are exposed to capture; this rigorous consequence appears to us only logical and in conformity with principles."

As to conditions imposed on hospital ships, it was suggested that notification of their character should be made "before the opening of hostilities"; but this was rejected in favor of the phrase "before they are employed." This decision was made for the reason that it would be cruel to prohibit belligerents from developing their hospital service after war has commenced and in accordance with its exigencies. It was also argued that since "military," or government, hospital ships were to be exempt, by Article I, from the rules applying to men-of-war during their stay in neutral harbors, a notification of their names and use should be made to neutral states as well as to the belligerents themselves. But the reply was made that the dis-

tinguishing marks of a hospital ship would be sufficient notice of its character when entering a neutral port; although it was admitted that it would be *desirable* for such notices to be inserted in the official journals of the belligerents, so that all the world might be informed.

In order to insure to the belligerents the efficient control of the private or semiprivate hospital ships fitted out by neutrals, it was urged (by Captain Mahan, among others) that such vessels, "being engaged in service identical with that of belligerent hospital vessels to which it was proposed to extend the utmost possible immunity, should frankly enter the belligerent service by hoisting the flag of the belligerent to which it offered its services. This being permitted by general consent, and for purposes purely humanitarian, would constitute no breach of neutrality, while the control of either belligerent, when in presence, could be exercised without raising those vexed questions of neutral rights which the experience of maritime warfare shows to be among the most difficult and delicate problems that belligerents have to encounter." This proposition was opposed vigorously by Captain Siegel, of Germany, who argued that "to compel such vessels to hoist a foreign flag would be an act incompatible with the sovereignty of the state to which they belong, — an act which could be deemed but little friendly by the power not favored, and which would even constitute, perhaps, a violation of strict neutrality to the advantage of one of the belligerents." This view of the question prevailed, and all hospital ships were permitted to carry the flag of their own country.

When the question as to the distinctive flag for hospital ships arose in the subcommission, the representative of

Turkey said that in all cases where Turkish hospital ships have to perform their mission, the emblem of the Red Cross would be replaced by the Red Crescent; he said in addition that, since Ottoman ships of war have always respected the Red Cross as the emblem of the Geneva Convention, he would express the desire that by way of reciprocity the Red Crescent should be assured the same respect. The representative of Siam said that his government places beside the Red Cross, on the flag of the Geneva Convention, an emblem sacred in the Buddhist religion, also in red and called "The Flame." And at a later meeting of the full commission the representative of Persia made the following declaration:

"In accordance with instructions which I have just received from Téhéran, I am directed to inform the commission that the Persian Government will claim, as a distinctive flag, a white flag with the Red Sun. The adoption of the Red Cross as the emblem of hospitals was an act of courtesy on the part of the governments signing the Geneva Convention towards the honorable government of Switzerland, whose national flag was adopted, with the colors reversed. We should be happy to extend the same mark of courtesy to the honorable government of Switzerland, if that were not impossible because of agitations which would result from it in the Mussulman army."

Captain Mahan, of the United States, remarked that the emblem of the Red Cross has a religious character which is addressed particularly to Christian states, and he thought that it would be better to adopt another one which would be recognized by all. But the president of the subcommission remarked that it was not competent to enter on the discussion of a proposition tending to revise a clause of the Geneva Convention. This view prevailed, and the conference adopted the Red Cross as the

emblem of hospital ships, but recorded the declarations of Turkey, Siam, and Persia regarding it; and these three governments signed it as adopted.

b. The Conference of 1907

The last item on the Russian programme for the second conference was "the additions to be made to the Convention of 1899 for the adaptation to maritime war of the principles of the Convention of Geneva of 1864, revised in 1906."[1] This topic was assigned to the second subcommission of the III Commission, and was the first topic completed by the conference. When it came up for discussion, the delegations from Germany and France proposed modifications of detail in the former convention, while certain other delegations, notably that of the Netherlands, proposed modifications in its principles.

As to the kind of vessels to be used for hospital purposes, it was decided that, instead of permitting neutral merchantmen, yachts, and other non-military boats to take on board the sick, wounded, and shipwrecked, and then to hold them exempt from capture [as was done by Article VI of the former convention], belligerents should be given the right of *requesting* them to do so, and that only in case they acted upon such request, and not on their own initiative, were they to be given "special protection and certain immunities." This restriction of the charitable activity of neutral vessels was defended on the ground that such rescue work is not a right conceded to neutral ships by international law, or by logic or humanity; but that to request it should be a right conceded to belligerents

[1] For this revision, see later, page 193.

which they would not be slow to exercise, and that humanity would dictate compliance with the request on the part of neutral vessels.

In regard to distinguishing marks, it was decided that hospital ships should hoist at night three lights, green, white, green, placed vertically one under the other; and when to this plan the objection was made that it would betray to the enemy the maneuvers of the fleet with which the hospital ships sailed, it was decided that this distinctive sign should be used only in time of battle.

The question of the flag under which neutral hospital ships should operate gave rise in the second conference as in the first to considerable discussion. M. Renault, of France, argued in favor of the independence of such ships being maintained by the use of the flag of the neutral nation; but the belief prevailed that such independence would result in serious interference with the military rights of belligerents. It was accordingly decided that neutral hospital ships complying with the request of a belligerent to render aid should hoist that belligerent's flag, together with the Red Cross flag, and be submitted to the belligerent's control. This was the proposition which was supported in 1899 by Captain Mahan, of the United States, and by several other delegates, and which was vigorously and successfully opposed by Captain Siegel, of Germany. In the 1907 conference, Captain (now Admiral) Siegel admitted that in view of the latitude given to neutral hospital ships in regard to their armament, their personnel, and their use of wireless telegraphy, it would be desirable that the belligerent flag should replace that of the neutral nation.

As to the armament of such ships, it was voted that

"they have no need of other cannon than those which are requisite for the making of signals."

The use of radiography on board hospital ships was permitted in the interest of efficiency; and the argument that it might be used to send dispatches injurious to the belligerent was met by the statement that the removal of radiographic apparatus, by order of the commander of a belligerent force, would be very easy, and that it would be possible also to receive messages by means of it and at the same time to prevent their being sent.

The Turks and the Persians reserved the right of replacing the Red Cross by the Red Crescent and the Red Lion (or the Red Sun), respectively; and their appeal for reciprocity in this regard was accepted, not by the conference as a whole, but by several separate delegations. Great Britain accepted their appeal in a plenary session of the conference, and Russia, in accepting it in a reunion of the commission, recalled the fact that "during the war of 1877–1878 the Red Cross and the Red Crescent acted together in protecting the humanitarian interests of which they are the symbols."

2. The Personnel of Captured Ships

a. The Conference of 1899

The articles of the Geneva Convention have to do with two classes of persons on board captured ships; namely, the religious, medical, and hospital staff, and the sick, wounded, or shipwrecked soldiers and sailors.

The conference decided that the religious, medical, and hospital staff of any captured ship should be inviolable and that its members must not be made prisoners of war; that

on leaving the captured ship they may take with them their private property, including their scientific instruments; that this staff shall continue to fulfill its functions as long as it is necessary, and that it can then leave the ship when the commander in chief considers it possible; and that the belligerents must guarantee to the staff that has fallen into their hands the enjoyment of their emoluments intact.

In the debate on this article, a delegate from Japan asked if the emoluments referred to were meant to be those accorded by the government of the captured or the captor ship, and argued that they should be those of the captor. But a delegate from France replied that if this view prevailed, emoluments in certain cases would be nothing at all, and that it would be simpler and more just to assure to the staff its accustomed emoluments. An Austrian delegate argued that it would cause great inconvenience to restore the staff to liberty, and that it should be kept under the surveillance of the commander in chief; but the principle was insisted upon that it should be considered inviolable, and its members not held as prisoners of war, but should be permitted to leave the ship as soon as possible. The commander in chief was to decide when this time had arrived, but he should act wholly under the idea that he was not dealing with prisoners of war, and did not have the power of dealing with them capriciously. Captain Mahan's suggestion, that "a time should be fixed after which the staff should necessarily be liberated," was not adopted.

Sick, wounded, or shipwrecked soldiers and sailors, to whatever nation they belong, must be protected and cared for by their captors, but they are regarded as prisoners of war; the captor must decide, according to circum-

stances, whether it is best to keep them, or to send them to a port of his own country, to a neutral port, or even to one of their own ports; and in the last cited case, prisoners thus restored to their country can not serve again during the continuance of the war, unless duly "exchanged."

In making these rules the conference refused to use the term "victims of maritime war," and accepted that of "sick, wounded, or shipwrecked soldiers and sailors." This was done on the motion of delegates from Japan and Turkey, who said that during the recent Chino-Japanese and Greco-Turkish wars, sick and wounded soldiers belonging to land armies were captured while being transported by sea. The phrase adopted includes *all* sick or wounded soldiers and sailors found on board captured ships, whether their sickness or wounds were incurred before or after coming on board. The use of the word "captor" was also objected to, since it might exclude the sick and wounded on board hospital ships and neutral merchantmen which are exempt from "capture"; but on the motion of Captain Schéine, of Russia, it was decided that "capture" in such cases would be accomplished by a mere "visit," made by a war ship to them.

As to the status of "prisoner of war" which was retained for the sick, wounded, or shipwrecked, the objection was made that it is a useless and cruel one. But the reply was made and accepted that the fundamental principle to be applied is that "a belligerent has in his power hostile combatants; it matters little that they are wounded, sick, or shipwrecked, or that they have been taken on board a vessel of any particular kind. They must be treated humanely, of course, — this is also a fundamental principle; but they are the *prisoners* of their captor."

A delegate from Siam objected to the proviso that the captor may send such prisoners to one of their home ports, saying that it had no practical use. But it was shown that such a course might be taken when there was no other port near, or when the prisoners were very seriously ill or wounded. Both humanity and interest would dictate such a course; for the captor would burden neither himself nor his country with the hopelessly sick or wounded. The Siamese motion that this clause be stricken out was accordingly rejected. A Japanese motion, that the word "serve" be replaced by "take up arms again," was also rejected; although it was conceded that the sick and wounded captured by the enemy and restored to their country could only serve in civil offices, ambulance corps, etc., and not as combatants, unless duly exchanged.

In the case of the shipwrecked, wounded, or sick landed at a neutral port, it was provided that they could be so landed only with the consent of the neutral state; but that once landed there, they must be guarded by the neutral state so that they can not again take part in the war. This rule led to an animated debate, was adopted by a bare majority of the delegations, and was rejected by a number of important governments who signed the convention only on the condition that this article be inoperative in so far as they were concerned.

The first part of the rule was accepted by every one. A neutral country does not break the laws of neutrality by receiving such guests; but they can not be forced upon it by the belligerents: humanity and its own wishes alone can dictate their reception. But the second part of the rule, that the neutral nation, once receiving them, must prevent their taking part again in the war, was strongly

opposed. The opposition argued that the laws of war on land permitted the neutral nation to send sick and wounded soldiers back to their own land; that the laws of war on the sea permitted belligerents to send their sick and wounded captives back to their own land; that it would be an infringement on the rights of neutrals to compel them to bear the burden of guarding belligerent guests during the whole course of the war; and, finally, that an epidemic of disease might break out in the port or town of their detention, in which case at least the neutral state should be free to send its guests home.

The supporters of the rule replied to these arguments that shipwrecked sailors were not so harmless as wounded soldiers, and neutral states receiving them should prevent their reëntry into the war; that there is a great difference between one of the belligerents restoring captives to their own country and a neutral state doing the same thing, since "the neutral is less competent to decide on their condition than is the belligerent"; that the burden of guarding sailors would be far less than that of guarding soldiers, since very few sailors would be landed in a neutral country in comparison wi h the large number of soldiers who would find their way to a neutral country after a land battle; and that the expenses incurred by a neutral state in caring for and guarding the belligerents it receives must be paid by the state to which they belong.[1] A vote was taken on the rule, after this prolonged discussion, and resulted in its adoption by ten delegations against nine.[2]

[1] This last provision was made a part of the rule as adopted.

[2] It is to be noted that three of the ten delegations voting "aye" signed the convention at the end of the conference only on the condition of complete liberty of action so far as this rule was concerned; the United States, which was one of the nine delegations voting "no," also signed it under the same condition.

This vote in its favor was so indecisive that, at a subsequent meeting, it was decided to add the proviso that the rule would be operative on neutral countries only "in the absence of a contrary arrangement between the neutral state and the belligerents." This proviso was based on the supposition that belligerents would be so anxious to have their sick, wounded, and shipwrecked received by neutral states that they would make arrangements for their return to their own homes and thus relieve the neutral states of the burden of guarding them. This modification of the rule induced all but one of the nine delegations voting "no" to accept the rule and sign the convention. The other one, the United States, signed the convention, but excluded this rule; and Germany, Great Britain, and Turkey did the same.[1]

The United States naval representative, Captain Mahan, believed that the articles as adopted by the special committee, the subcommission, the commission, and the conference omitted an important topic, that, namely, of the rescue of belligerents by neutral vessels which chanced to be present on the arena of combat. This topic was suggested to Captain Mahan by the case of the rescue of the captain and men of the "Alabama" by the British yacht "Deerhound." In order to prevent a similar escape of a commander in chief and other important officers from the hands of a victorious belligerent through the intervention of a neutral boat, Captain Mahan proposed in the subcommission that men rescued by neutral vessels of any kind, hospital ships or others, shall not be considered

[1] It was arranged in 1900 that the convention could be signed by these four countries, and that where this rule (Article X) should appear, there should be inserted the word "Exclu," — *excluded.*

under a neutral flag, but shall be surrendered on demand to a ship of war of either belligerent; in case no such demand be made, the men thus rescued are not to serve for the rest of the war, unless duly exchanged, and the government of the neutral rescuer must prevent as far as possible such persons from serving until discharged. Captain Mahan supported his proposition before the special committee of experts,[1] in a two hours' session, but failed to secure its adoption, either by the committee or the commission. On being informed that a further attempt to secure its adoption would probably imperil the unanimity with which the other articles had been received, the United States delegation instructed Captain Mahan to withdraw his proposed additions; this he did by letter to the committee, and with a statement to the conference that the delegation's reason for doing so was "not because of any change of opinion as to the necessity of the proposed additions, but in order to facilitate the conclusion of the labors of the conference."

b. The Conference of 1907

The conference did not modify the rules of 1899 as far as the religious, medical and hospital staff of captured ships was concerned; but it did amplify the rules concerning the sick, wounded, or shipwrecked soldiers and sailors of such ships. It provided that any belligerent war ship may demand the surrender of the sick, wounded, or shipwrecked on board military hospital ships, the hospital ships of charitable societies or individuals, and merchant ships, yachts, etc., whatever may be the nationality of such vessels.

[1] This committee was composed of one member each from Great Britain, Germany, Russia, and France.

When this rule was debated in the subcommission, it was admitted that a belligerent war ship, exercising its right of visit to such ships and finding disabled men on board, would often find it to its own advantage not to burden itself with them, but to leave them where they were found. But it was argued that, if it should appear that such disabled men, and especially those rescued from drowning, would still be able to render important services to their country, they should not be permitted to escape, but might be demanded by the belligerent war ship and must be surrendered to it. This belligerent right was conceded on the express ground that both the Conventions of 1899 and 1907 regard such men as prisoners of war, since, in spite of their physical condition, they are combatants of a belligerent nation and have fallen into the power of the enemy.

It was also urged that to compel a neutral ship to surrender the wounded, whom it had received out of charity, would be an act of inhumanity. But to this objection the reply was made that international law would permit not only the seizure of hostile combatants found on board a neutral ship, but the seizure and confiscation of the ship itself, for having rendered a non-neutral service; and, further, that if men rescued from drowning, for example, could escape capture solely because they had found refuge on board a neutral ship, the belligerent powers would eliminate the charitable activity of neutrals from the moment that such activity might result in an irreparable injury to themselves, and that thus humanity would be an even greater loser in the absence of the rule.

It should be noted that the rule as applied to neutral merchant ships gives to belligerent cruisers only the right

of demanding the surrender of the refugees on board of them, and not the right of capturing them or even of turning them from their route or imposing upon them a fixed itinerary.

The French delegation, influenced by an incident in the recent Russo-Japanese War, proposed that the shipwrecked, wounded, or invalids received on board a neutral war ship should not be surrendered to their enemy, but should be kept under guard. This proposition was adopted by the conference, on the ground that such refugees should receive treatment analogous to that accorded to combatants who take refuge in neutral territority.

One other rule, adopted from the Geneva Convention as applied on land, was that after each combat the two belligerents, in so far as military interests permit, shall take measures for rescuing the shipwrecked, wounded, and invalids, and for protecting them, as well as the dead, against pillage and ill treatment; they shall also take care that the burial, immersion, or incineration of the dead be preceded by an attentive examination of the corpses. This last reference to the *burial* and *incineration* of the victims of maritime warfare was intended to cover the case of a battle fought near the coast on which the bodies of many victims would be found.

C. THE PRIVATE PROPERTY OF BELLIGERENTS

a. The Conference of 1899

The Russian programme contained no reference to the exemption of private property from capture in maritime warfare; but the United States government instructed its delegation to introduce the subject before the conference

at the first favorable opportunity. An attempt was made in an informal meeting of the first delegates on the day after the opening of the conference to secure general consent to its introduction. But this attempt failed, owing to objections strongly urged by the representatives of Russia, Great Britain, and France. The chief objection urged was that, unless the programme were strictly adhered to, and every topic not included within it were rigidly excluded, the conference would find itself overwhelmed by the flood of topics pouring in upon it from outside sources and would end in confusion, discord, and failure.

A good deal of private persuasion was required to convince most of the first delegates that an exception to this wise rule should be made in favor of the topic which the United States delegation had so much at heart. Finally when, in July, the II Commission adopted the rule that private property should not be confiscated in warfare on land, Ambassador White, of the United States, believed that the best opportunity had arrived, and he prevailed on the commission's president, Professor de Martens, of Russia, to read a letter on the subject which he had written to the commission. Professor de Martens said that he was happy to state that "as early as 1823 Russia had expressed its sympathy with the American idea, which has a right to the benevolent interest of the whole world." "But," he continued, "will it be possible to discuss here this important question? If this inviolability be admitted, the maritime states will have to change radically their plans and projects. The question is so complex that it will be very difficult to find, under present circumstances, a solution acceptable by every one; and a decision will have

value only if it be taken unanimously." He then proposed that the consideration of the question be referred to a later conference, "better prepared to answer it and to elaborate a plan which can secure universal consent." "If this commission will adopt this proposition," he concluded, "it will both show its prudence and at the same time will yield homage to the generous initiative of the United States."

Sir Julian Pauncefote, of Great Britain, opposed the proposition of Professor de Martens, arguing that, the topic not being on the programme, it should not be raised at all. Captain Schéine, of Russia, shared Pauncefote's opinion, and said that, since his instructions had nothing to do with the laws and customs of maritime war, he would abstain from participating in any discussion of the question raised.

Ambassador White, on the other hand, argued that the conference was quite as competent for the consideration of this question as for that of many others which had been settled by it. But he admitted that the time was not favorable for a proper discussion of it, although it was of great importance to all the powers represented; and he therefore proposed that it be submitted to the whole conference in plenary session, which would decide whether it would discuss it or confide its consideration to another conference. "And," he said in conclusion, "if the conference does not desire to discuss the question, the United States delegation will yield to the reference of it to another conference. We do not want to hurl a brand of discord into our meetings and thus injure results secured on other very important questions; we ask only that our proposition, which has been made in entire good faith, be submitted

to the conference in plenary session; there, we will not oppose the reference of the question to a later conference."

M. Rahusen, of the Netherlands, said that he agreed with Ambassador White as far as the question of competence was concerned: "The conference has considered the question of private property on land; why not as well examine the question of private property on the sea? And, moreover, for what reason should one question be treated differently from the other?" As an immediate solution of the question, he suggested that the governments favorable to the principle of inviolability should secure it by making separate treaties with each other.

After a further discussion as to the competence of the conference to deal with the question in any way, the commission resolved by unanimous vote, Great Britain, France and Russia refusing to vote at all, that the question should be referred to a later conference, and that this resolution should be submitted to the existing conference for its approval in plenary session.

When this resolution was reported to the conference on the 5th of July (the same day on which the commission had adopted it), Ambassador White made a noteworthy address in support of the principle of the inviolability of private property, with the exception of contraband of war, in time of naval warfare, — a principle which "the government of the United States, during more than a century, has seriously endeavored to have adopted" in international law. After admitting that, because of the doubt as to its competence to deal with the question, the existing conference did not furnish a suitable opportunity for its discussion, Dr. White continued:

"But, obliged to recognize this fact with a sincere regret, we believe that our instructions impose upon us the duty of doing all that is within our power to bring this great question, so important for us all, prominently before the minds of the nations represented here.

"We have not lost the hope of seeing this question brought to a favorable solution. Nothing is more evident than the fact that, more and more, eminent thinkers in the domain of international law are inclining towards the doctrine which we defend. More and more, also, it is becoming plain that the adoption of this principle is in the interests of every nation.

"It must be acknowledged that any agreement to abstain from privateering is idle, if it does not at the same time recognize the inviolability of all private property on the sea, with the exception of contraband of war. The two systems of injuring the enemy during war are logically united. If abstention from the use of one system is agreed on, a necessary guarantee of that agreement is that the other will not be resorted to.

"It is becoming more and more evident that the eminent Count Nesselrode expressed not only his profound conviction, but also a great truth, in affirming that this declaration, which the United States supported in his time as it does now, will be a crown of glory to modern diplomacy.

"I am not ignorant that an argument has been advanced which, at first sight, may seem to have considerable force, the argument that even if we should guarantee the inviolability of private property, with the exception of contraband of war, a new and very knotty question would immediately arise, the definition, namely, of what should be understood to-day by contraband of war.

". . . But I surely need not say to an audience as intelligent and enlightened as this, that the difficulties which may beset the taking of a second step in an affair of this kind do not constitute a reason for renouncing the first step. The wiser course would seem to be to take the first step and, having taken it, to consider what should be the second.

". . . It must be admitted that more harm than good has been done by some of the arguments which have likened private property on the sea to private property on the land in time of war. But that proves nothing against the crushing mass of arguments in favor of our

proposition. If the question were under discussion at the present moment, if there were not other subjects on which the attention of the world is centered, and which absorb our activities, I should like to direct your thoughts to the immense losses which would be suffered by the nations in case of a declaration of war. I would cite as example the losses resulting from the denationalization of merchant vessels, without a proportionate effect upon the decision of the questions in dispute.

"A rapid glance at the history of the Confederate cruisers during the American Civil War shows how serious would be the loss of the power directly interested. Three Confederate cruisers alone played a part of considerable importance; their prizes were limited to 169 ships; the rate of insurance between the United States and Great Britain increased from 30 to 120 shillings per ton; nearly one half million tons of American merchant shipping were placed under the English flag; the final result was the almost entire disappearance of the merchant marine of the United States. If such a result was secured by the operations of three small ships, far from excellent and badly equipped, what would happen with the means which to-day are at the disposal of the large nations?

"On the other hand, all the world knows that this use of privateers had not the slightest effect in terminating or even shortening the war. If those losses had been ten times greater, they would have contributed nothing to the abridgment of hostilities. There would have been simply the destruction of a large quantity of property belonging to the most laborious and the most meritorious part of our population, — that of our merchants who had placed on board their ships the wealth which they had earned. The most evident result was to leave a cause of resentment between two great nations, — a resentment which a famous arbitration succeeded in removing.

". . . Gentlemen, the American delegation does not defend the particular interests of its own country. We know very well that, under present conditions, if war were declared between two or more European powers, there would be immediately an enormous transfer of cargoes and ships to neutral countries, and that the United States, as one of them, would reap from it enormous advantages. But my government does *not* desire to profit in ways of that kind.

"May I not say that a characteristic trait of my fellow-citizens has

been greatly misunderstood in Europe? Europeans generally suppose that the people of the United States is a people eminently practical. That is true; but it is only one half of the truth. For the people of the United States are not only practical; they are still more devoted to the ideal. There is no greater error, when one regards the United States, or when one deals with it, than to suppose that its citizens are guided solely by material interests. Our own Civil War shows that the *ideal* of maintaining the Union of the States led us into a conflict which cost the sacrifice of nearly one million men and of nearly ten thousand millions of dollars.

"I say this not from vanity, but to show that Americans are not merely practical people, but are idealists also; and they are such as regards the question of the inviolability of private property on the sea. This is not merely a question of interest for us; it is a question of right, of justice, of progress for the whole world."

Dr. White then made an appeal for the consideration of "this grave question" by all the members of the existing conference, and for its specific reference to a future conference, declaring, in conclusion, that "the solution of this question, in the way which I have indicated, will confer honor upon all those who shall have participated in it, and will be to the enduring advantage of all nations interested."

Count Nigra, of Italy, supported the proposition to refer the subject to another conference, and said that the Italian government has not restricted itself to the protestation of respect for private property on the sea, but has sanctioned the principle in its laws. He recalled, in particular, an article of the commercial treaty concluded between Italy and the United States, which stipulates, under the proviso of reciprocity, a recognition of the inviolability of such property.

President de Staal then consulted the conference on the adoption of the proposed resolution; thereupon Sir Julian

Pauncefote explained that in default of instructions from his government in regard to the matter he would be obliged to abstain from voting. The resolution was then voted by acclamation, and was embodied as one of the six *desires* (*vœux*) of the conference under the following form: "5th. The conference expresses the desire that the proposition tending to declare the inviolability of private property in warfare upon the sea be referred for consideration to a later conference."

b. The Conference of 1907

1. *Merchant Ships and Cargoes*

Although the United States delegation had failed in the first conference to have the subject of the exemption of private property in maritime war discussed, it had succeeded in directing attention to it in an impressive manner and in having it included, so far as the conference could do so, in the programme of topics for the subsequent conference. The United States Congress in April, 1904, passed a joint resolution that the president should endeavor to induce the chief maritime powers to recognize the principle contended for in the permanent law of civilized nations; and President Roosevelt, through Secretary Hay's circular letter to the powers, dated October 31, 1904, inviting them to meet in another conference, emphasized the importance of the question and the need of having it considered in the proposed conference. Russia, too, in its official programme of March 24 (April 6), 1906, mentioned it specifically among the subjects to be discussed. There could be, then, no question this time as to the competence of the conference to deal with it; and it was

referred specifically to the IV Commission to be considered.

At the first meeting of this commission, June 24, Ambassador Choate presented the American proposition, as follows:

"The private property of all the citizens of the signatory powers, with the exception of contraband of war, shall be exempt on the sea from capture or seizure by either the armed vessels or the military forces of the said powers. Nevertheless, this provision does not at all imply the inviolability of vessels which should try to enter a port blockaded by the naval forces of the said powers, nor the inviolability of the cargoes of the said ships."

Four days later, this proposition came up for discussion and was approved by the representatives of Austria, Brazil, and Italy, who claimed for their countries a long and practical support of the principle embodied in it. On the other hand, M. Nelidow, speaking simply as a member, and not as the president, of the conference, said that such immunity of private property might promote war instead of peace, because it would destroy the financial arguments of maritime and commercial communities for the maintenance of peace; but he was careful to state that this was only a personal opinion and he would not at all say that Russia would oppose the proposition.

Ambassador Choate then made an eloquent speech, in which he traced the efforts made by the United States and its diplomatists, from the time of the treaty with Great Britain in 1783 down to the first Peace Conference, to have the principle embodied in his proposition accepted as international law; he mentioned the support given it by various European countries; cited English and Russian writers, such as Lord Palmerston, Richard Cobden,

John Stuart Mill, Professor de Martens, Count Nesselrode, and Prince Gortschakof, who had admitted its justice; and showed that technical progress makes of privateering a kind of anachronism, that the game has become not worth the candle, and that the tendencies of modern civilization are all in favor of the enforcement of this American idea.[1]

At the next meeting of the commission, Baron von Bieberstein, of Germany, spoke of the traditional sympathy in his country for the American attitude towards private property on the sea, but said that because of the uncertainty as to the exact meaning of the terms "contraband" and "blockade," which are stated as exceptions in the American proposition, he could not assent to that proposition until the uncertainty as to the meaning of the two terms mentioned was removed.

The delegates of Great Britain, Portugal, Russia, and France coincided with the German view of the question, and the French delegate proposed as a substitute for Mr. Choate's proposition that the states which may exercise the right of capture shall abolish the distribution of the booty among the crew of the captor ship, and shall take the necessary measures for preventing the losses caused by the exercise of the right of capture from resting entirely on the individuals whose goods have been captured.

Norway, Sweden, Austria-Hungary, and Brazil supported the American proposition, but Brazil proposed that, in case of its non-adoption, when the most imperious exigen-

[1] The eminent *rapporteur* of the commission, Professor Renault, of France, in commenting upon this remarkable address, said that "nothing has been omitted which is calculated to strike and hold the attention." Like Mr. Choate's other addresses, it was spoken in English, and then translated into French and printed copies supplied to all the delegates.

cies of war compelled the exercise of the right of capture, the individual from whom the goods were seized should be given the right of just indemnity.

The Netherlands proposed that in order to prevent merchant ships once captured and released from being converted into ships of war, they should be furnished with passports by their own governments in which the express promise should be made that they would not, under any circumstances, be used as war ships so long as the war lasted; and that only when furnished with such passports should merchant ships and their cargoes be exempt from capture.

M. Perez Triana, of Colombia, opposed the American proposition, on the ground that privateering is the natural weapon of warfare for a weaker nation, without war ships, to use against a stronger; and he replied to Mr. Choate's statement that the capture of private property on the sea is a relic of piracy, by saying that war itself is only organized murder, and that when war commences privateering is justifiable also. M. Triana also made a veiled attack upon the United States' recent policy of building up a large navy while its merchant marine has been dwindling, and contrasted it with the policy of a small navy and a large merchant marine which marked the "good old days when the United States was the disinterested defender of the principles of justice and humanity."

At the next session of the commission, M. Beernaert, of Belgium, made a powerful appeal for the adoption of a compromise between the extremes of the entire abolition and the unrestricted use of the capture of private property on the sea; and he proposed as this compromise that vessels exclusively devoted to the fishing industry, or

to scientific and hospital purposes, should be exempt from capture; that merchant ships and cargoes could be seized, but should be restored or compensated for at the end of the war; and that the officers and crews of such captured ships should not be retained as prisoners of war, but should be disembarked as soon as possible and set at liberty on condition that they should take no part in the war.

The second delegate from China (Hon. John W. Foster, a citizen of the United States) supported the American proposition and, asserting that in our times peace is the normal state of nations and war the abnormal, he made an eloquent plea for every possible measure which should make the high seas free to the peaceful commerce of the world, unharassed by fear of the brutalities of war.

The first delegate from Spain announced that he would oppose the American proposition, but that his country would hereafter accept in its entirety the Declaration of Paris of 1856[1] whose principles it had observed in practice, notably during its last war.

After the discussion of the question had been carried through four sessions of the commission, Mr. Choate demanded that a vote should be taken, and that the American proposition, having been presented before any of the various other propositions, should be voted on first. This was done, on the 17th of July, and resulted in twenty-one

[1] The Declaration of Paris of 1856 prohibited privateering in time of war; but, as Ambassador Choate explained in the course of the debate in the Conference of 1907, the United States had never adhered to that declaration because it had not also prohibited the capture of private property by war ships; and because, as Ambassador White had argued in 1899, privateering and the capture of private property by war ships should be abolished together.

votes in favor of the proposition, eleven against it, one abstention, and eleven absent.[1]

When this vote was announced, the Belgian delegate moved that a vote be taken on the substitute proposition presented by him. Ambassador Choate objected to this, saying that since the commission had already decided by a strong majority in favor of the American proposition, he did not think it necessary to discuss taking a half-loaf when the whole loaf had already been gained. This statement led to a discussion of the significance of the vote just taken, and the opponents of the American proposition argued that although a decided majority of the votes cast had been in its favor, still there were absent eleven delegations, one of whom, Argentina's, had expressed itself as opposed to the proposition, and all might be; and that the delegations voting aye represented 804 millions of people, "400 millions of whom were Chinese," while those voting no represented 729 millions. This last statement brought two representatives of China to their feet to demand an explanation of the implication that the Chinese should not be counted.

At the end of a rather animated discussion it was decided that the other propositions should be voted upon so as to see if greater unanimity could be secured than in the case of the American. Accordingly, at the next meeting the Brazilian proposition was voted on without discussion,

[1] The ayes were: United States, Germany, Austria-Hungary, Italy, Denmark, Norway, Sweden, Greece, Belgium, Holland, Switzerland, Bulgaria, Roumania, China, Persia, Siam, Turkey, Brazil, Cuba, Ecuador, and Haiti; the noes were Great Britain, France, Russia, Japan, Spain, Portugal, Montenegro, Mexico, Colombia, Panama, and Salvador; Chili abstained from voting; and Luxemburg, Servia, Argentina, Bolivia, Dominican Republic, Guatemala, Nicaragua, Paraguay, Peru, Uruguay, and Venezuela were absent.

and resulted in thirteen ayes, twelve noes, and nineteen abstentions and absences.[1] The Brazilian proposition was thereupon withdrawn and the Belgian taken up. Great Britain's delegation opposed this proposition on the ground that the advantages offered by it to commerce would not compensate for the difficulties it would entail upon belligerents; and France's delegation opposed it because it would be unjust to those powers which do not possess a large number of widely separated ports to which to conduct their prizes. A vote was then taken, with the result that fourteen powers voted for the proposition, nine against, and seven abstained.[1] The Belgian proposition was thereupon withdrawn, and Professor de Martens, of Russia, proposed that a *desire* (*vœu*) be expressed by the conference that belligerent powers, following the precedent set in the Crimean and the Austro-Prussian Wars, should at the commencement of any war declare whether they would or would not renounce the practice of capture. But in the face of opposition this proposition too was withdrawn and without formal vote.

The further discussion of the question was now postponed for three weeks until the delegations could secure instructions in regard to the French proposition. When this was voted upon, August 7, the first clause providing for the abolition by national legislation of the distribution of the prize received sixteen ayes, four noes, and fourteen abstentions. The second clause, changed by an Austrian amendment which was accepted by the French delegation and providing that the states should seek the means of preventing losses due to capture from falling

[1] The United States delegation voted in the negative.

entirely upon the individual owners, received seven ayes, thirteen noes, and fourteen abstentions.

The United States delegation voted against both clauses of the French proposition, and Mr. Choate explained that although the delegation sympathized with every step towards the realization of the immunity of private property on the sea, its negative vote was due to the following considerations: First, the vote for its own proposition showed that it expressed very well the opinion of the majority of the conference; second, the United States had recently suppressed for itself the distribution of prizes; third, the second clause of the French proposition had to do with a question which was purely national and which should be answered by each country individually; and, fourth, the delegation believed that the French answer to this question would do nothing for the protection of commerce, but would tend rather to increase than to diminish the chances of capture by making it known that the loss would ultimately be sustained by the state, while it would assuredly give rise to many and varied claims during each war which would have to be adjusted at its conclusion by diplomacy or by the national courts.

The facts of this long discussion were presented by the commission to the conference at its plenary session of September 27. But neither in the commission nor in the conference was any further attempt made to reach a definite conclusion on the question. This disposition of the subject has since been explained by Mr. Choate as follows: "It was not possible, however, in the face of great commercial nations that opposed it, nations likely at any time to be engaged in war, to press it further. We were instructed never to press anything to the point of irritation,

but if we found that it was not possible to carry a thing by general consent, then we were to carry it as far as we could and drop it and leave it for further consideration in the hope that by and by, by the growing sense of the nations, it would be accepted." [1]

2. *Delay of Favor to Merchant Ships*

This topic was brought before the IV Commission by its president, Professor de Martens, of Russia, in the form of two questions:

"Is it good warfare (*de bonne guerre*), at the moment of the opening of hostilities, to seize and confiscate merchant ships belonging to the enemy, lying in the ports of one of the belligerents? Is it not necessary to concede to such ships the right of free departure within a fixed time, with or without cargoes?"

Professor de Martens, in proposing to answer the first question in the negative and the second in the affirmative, remarked that he did not desire to establish any new rule, but merely to codify current custom; and the Russian naval delegate made an appeal to "the history of warfare from primeval times down to our own day" to prove that the Russian proposition was in accord with current custom, and that the delay should be obligatory. The German delegation accepted this view of the question of obligation, but based it on the history of only the last half century. Captain Ottley, of Great Britain, stated that his country had accorded the delay as a *favor*, and objected to its being made a *right*. The Japanese delegation made the same statement and objection as the British;

[1] From an address before the New York State Bar Association, January 24, 1908.

and Admiral Sperry, of the United States, said that the delay should be obligatory upon belligerents only within the limits of military necessities.

France proposed as a compromise between the extremes of *favor* and *right*, that the statement be made that the "delay of favor is desirable," but that, if a merchant ship should be seized without warning, or before it could profit by a warning to make good its escape, it should not be confiscated, but either retained during the war and restored without indemnity after the war had ended, or requisitioned on condition of indemnity. This compromise proved acceptable to both parties to the controversy, and was adopted by the conference.

As to the duration of the delay, the Russian proposal was merely for "a fixed time"; but the Netherlands delegation moved that the time should be fixed at "not less than five days." Admiral Sperry and other delegates objected to the fixing of any specific time, and it was finally decided that the ship should be permitted to depart "immediately, or after a sufficient delay of favor."

There was general agreement that the delay of favor should apply both to merchant ships lying in the enemy's ports at the commencement of hostilities, and to those which, having left their last port of departure before the commencement of the war, enter the enemy's ports in ignorance of the hostilities. But when the question arose as to those ships encountered on the high seas in ignorance of the war, there was a decided difference of opinion. Great Britain championed the view that such ships should be accorded the same treatment as was provided for the other two classes. But Germany insisted upon the right of destroying them on the high seas, and argued that by

the British plan an injustice would be done those belligerents which had but few and concentrated naval stations to which to conduct their prizes, while those which had many and widely scattered ones would be at an advantage. To meet this objection, the commission adopted the rule that the ships referred to may be seized, on condition of restoration after the war without indemnity, or requisitioned or even destroyed, on condition of indemnity and under the obligation of providing for the security of the persons and the preservation of the papers on board. But this did not satisfy the German delegation, who argued that this plan would entail upon the powers not possessing many naval stations a heavy financial responsibility for doing the only thing they could do with their prizes, that is, destroy them. The Russian delegation supported the German view of the matter; but the British plan was adopted. And it was further provided that the cargoes found on board of all the three classes of merchant ships should be dealt with in the same way as the ships themselves.

When these rules came before the conference in plenary session, the delegations from Germany, Russia, China, and Montenegro made a reservation of the last one, while voting for the rest. The entire project reported from the commission to the conference received the votes of all the other thirty-eight delegations present,[1] with the exception of that of the United States. General Porter, of the United States, stated that his delegation would abstain from casting its vote for the project for the reason that the United States has always stood, and still stands, for the principle of the exemption of *all* merchant ships and their cargoes from

[1] Those of Nicaragua and Paraguay were absent.

capture, — except those carrying contraband of war or endeavoring to break a blockade.

3. *The Treatment of Captured Merchant Crews*

This topic was not included within the Russian programme or proposals, but was introduced by the delegations of Great Britain and Belgium. Great Britain proposed that when a merchant ship belonging to the enemy, but navigating with an exclusively commercial object, is captured by a belligerent, the members of its crew who are subjects or citizens of a neutral power shall not be made prisoners of war. The proposition also included the captain and officers of the ship, provided that they too were citizens of a neutral nation and would give a promise in writing not to serve on an enemy's ship during the rest of the war. This proposition was adopted unanimously.

Belgium's delegation proposed to extend this rule to the captain, officers, and crew of a captured merchant ship, even though they were subjects or citizens of one of the belligerent powers. And the commission and conference adopted this liberal proposal also unanimously.

4. *The Exemption of Certain Ships*

This topic was brought before the IV Commission by Professor de Martens's question, "Are coast fishing boats, even those owned by the subjects of a belligerent state, proper subjects for capture (*de bonne prise*)?" This question was answered by an Austro-Hungarian proposal to exempt from capture small coasting vessels in general, — except for requisition in case of military necessity; and by a Portuguese proposal to exempt

fishing boats from capture provided they do not approach war ships, or hinder the operations or place themselves at the service of a belligerent. If they did any of the excepted things, they were, according to the Portuguese proposal, to be treated as "auxiliary vessels"; and the large fishing vessels were to be considered merchant vessels, — "a status," remarked Ambassador Choate, of the United States, "which is accorded them in the American courts."

Count Tornielli, of Italy, proposed that the exemption of ships engaged in scientific or humanitarian missions should also be carefully considered.

There was no objection whatever to these various rules as they have been observed in practice for many generations, and every one was glad to see them "definitively consecrated in a conventional arrangement." The rule as adopted in regard to fishing boats provided that their exemption should depend upon their being used exclusively for coast fishing. But no attempt was made to define the distance out to sea implied by the term "coast fishing," because of the variety of coasts and of the depths of fishing. Nor was an attempt made to fix a limit on the tonnage of fishing boats, a maximum number for the crew, or any special kind of construction. It was thought that the sole proviso necessary was that they should be used exclusively for fishing purposes, and a strict prohibition was placed both upon their owners and upon the states to utilize them for any military purposes whatsoever while preserving their peaceful appearance.

The ancient custom of exempting ships engaged in scientific missions, which was strikingly illustrated by the case of "La Pérouse," was made the basis of the formal rule, proposed by the Italian delegation, exempting from

capture ships charged either with scientific or with religious or philanthropic missions.

5. *The Exemption of Mail*

This topic was not mentioned in the Russian programme, but was introduced in the IV Commission by the German delegation which proposed that correspondence conveyed by sea should be made inviolable, whatever its character, official or private, belligerent or neutral; that in case of the capture of the vessel carrying mail, the captor must provide for its expedition by the promptest means possible; and that, apart from the inviolability of postal correspondence, mail packet boats should be subject to the same conditions as other merchant ships, except that belligerents should abstain as much as possible from exercising over them the right of visit, and should make such visit with all possible consideration.

This freedom demanded for mail in time of war as in time of peace was willingly conceded by the conference, which passed the rule as proposed by the German delegation, except that mail destined to or coming from a blockaded port is not to be inviolable. The general satisfaction was expressed by General Poortugael, of the Netherlands, who congratulated the conference on having at last incorporated in international law a reform which has been striven for for more than thirty years.

D. THE RIGHTS AND DUTIES OF NEUTRALS

a. The Conference of 1899

This topic was not mentioned in the Russian programme, but was introduced into the discussions of one of the naval

subcommissions by a very elementary and relatively unimportant proposition. In connection with the question of the use of new arms and methods in naval warfare, Captain Schéine, of Russia, proposed that the contracting powers concede to neutral states the "faculty" [1] of sending their naval attachés to "the theater of maritime warfare," with the authorization and under the control of the competent military authorities of the belligerent powers. He argued that this action would give to neutral naval attachés the standing already conceded to military attachés in armies on land.

Against this proposition it was at first argued that there was no urgent need of providing for the measure, as it was already being resorted to. And when Captain Schéine replied that a recent case had proved that need, the subcommission decided that the proposition was equivalent to compelling belligerents to admit neutrals on board their war ships; that, since the practice differed in different countries, its regulation should be left to special treaties between neutrals and the belligerents; and that neither the subcommission nor the conference was competent to deal with the matter. It therefore declined to discuss it further, and the question of neutral rights and duties on the sea was not again brought up in the first conference. But, as will be seen later, in consequence of an important resolution adopted by the first conference concerning neutral rights and duties on land, the maritime rights and duties of neutrals came up in far more important aspects in the Conference of 1907.

[1] Captain Schéine first used the word "right" (*droit*), but changed it to *faculté*.

b. The Conference of 1907

The question of neutral rights and duties on the sea was mentioned in the Russian programme, and was referred to the IV Commission, of which the eminent jurist, Professor de Martens, of Russia, was president. It was soon apparent that the discussion of the question would launch the commission forth upon a domain which was not only vast and complicated, but was almost untraversed. The commission therefore decided that it would not divide into sections, as the other commissions had done, and that its first task should be the assertion of fundamental principles.

After prolonged discussion, in both a special committee of revision and in the commission itself, a preamble was agreed upon which asserted that the basis of any set of rules is the sovereignty of a neutral state, which can not be altered by the mere fact of a war in which it intends to take no part. Hence, belligerents are bound to respect the sovereign rights of neutral states and to abstain, within neutral territory and waters, from all acts which would constitute on the part of the states which would tolerate them a breach of their neutrality. And it is agreed that the enforcement by a neutral state of its rights shall never be considered as an unfriendly act by either belligerent.

On the other hand, it is conceded to be a neutral's duty to apply impartially to all belligerents the rules adopted, to exercise all the vigilance it can to prevent their violation, and not to change any rules during the course of the war except when experience has demonstrated the necessity of doing so in order to safeguard its rights.

It was deemed impossible for the conference to adopt

rules to meet all the circumstances which may arise in practice, and hence it was admitted that each neutral state should adopt for itself the other rules necessary. But, desiring to diminish as much as possible the differences which still exist in the relations of the various nations with belligerents, the conference requested the various powers to decree precise rules for regulating the consequences of the state of neutrality, and to communicate them to each other by means of a notification addressed to the Netherlands government and sent by it to the others.

1. *Belligerents in Neutral Waters*

The rules adopted by the conference for the use of the powers in common had to do with some, though unfortunately not all, of the subjects considered to be of prime importance. The conduct of belligerents in neutral ports and waters is first taken up. Belligerents are forbidden to use them as a base of naval operations against their enemy, and, specifically, to install in them radio-telegraphic stations or other apparatus designed to serve as a means of communication with belligerent forces on land or sea.

Any act of hostility, including the capture of ships and exercise of the right of visit, committed by belligerent war ships within neutral waters, constitutes a violation of neutrality and is strictly forbidden. If a ship be captured within the territorial waters of a neutral state, that state should, if the prize is still within its jurisdiction, use the means within its power of procuring its release together with its officers and crew, and for the confinement of the crew placed on board of it by the captor; if the prize has been taken beyond the jurisdiction of the neutral state, that

state *may* address itself to the belligerent government, which must release the prize with its officers and crew. A discussion arose over the word *may* in the last clause of the above rule, some delegations desiring that the word *must* should be used instead; but the majority decided to give to the neutral state the option of addressing itself to the offending belligerent, or to the new International Prize Court established by the conference. In accordance with old usage, belligerents are forbidden to establish any prize court on neutral territory or on a ship in neutral waters.

Belligerents are forbidden to bring their prizes into a neutral port, except when the bad state of the sea or lack of coal or provisions prevents navigation; and in such cases, the prize must be taken away as soon as the reason justifying its entrance has ceased to exist. If this is not done, the neutral power must order it to be done at once; and if its order is disobeyed, it must use all the means in its power to release the prize with its officers and men, and to confine the crew sent on board by the captor. The same rule applies to prizes which are brought into a neutral port without the reasons stated; except that access to neutral ports may be granted to prizes which are to be sequestered pending the decision of a prize court. This last exception, it was hoped, would help to abolish the destruction of neutral prizes.

The stay and transactions of belligerent war ships in neutral waters are regulated by a number of important rules. It is admitted that the neutrality of a state is not compromised by the simple passage through its territorial waters of belligerent war ships and their prizes; and that it can even permit such ships to make use of its licensed

pilots. A neutral state is conceded the right of imposing its own conditions for admission to its ports and waters, provided it enforces them impartially; and it may even exclude belligerent war ships which ignore such conditions or violate its neutrality.

Belligerent war ships are forbidden, in neutral ports and roadsteads, to repair their damages, except to the extent indispensable to the security of their navigation. These repairs must be effected as quickly as possible and under the supervision of the neutral power.

Belligerents are forbidden to increase, in any manner whatever, their military strength, in neutral waters. And neutral governments are bound to use all the means they possess to prevent, within their jurisdiction, the equipment or armament of any ship which they have reasonable grounds for believing is designed to cruise or to participate in hostile operations against a power with which they are at peace; they are also bound to prevent the departure of any such ship if, within their jurisdiction, it has been adapted wholly or partially to military operations. When this restriction on belligerents and neutrals alike was adopted, the delegation from Brazil proposed an amendment permitting the delivery from neutral dockyards of war ships which have been ordered more than six months before the declaration of war. This proposition was objected to chiefly by Dr. Drago, of Argentina, and was rejected in committee by a vote of seven against two, with five abstentions; and it was not renewed in the commission.

Belligerent war ships are forbidden, within neutral ports or waters, to renew or increase their military stores, their armament, or their crews. Neutral states, too, are forbidden, directly or indirectly, to furnish belligerent

fleets with war ships, munitions, or military material of any kind; but they are not bound to prevent the exportation or transit, for the use of either belligerent, of arms, munitions, or whatever may be useful to an army or a fleet.

The question of food and fuel supplies proved a difficult one and was warmly debated. The British delegation proposed that belligerent ships be prohibited from having their auxiliary vessels revictual them in neutral waters. This proposition was voted twice in committee, the first time by ten votes to four, but the second only by five votes to three, with six abstentions.

Belligerent ships of war, in neutral ports and roadsteads, can take on board only enough food to make up the deficiency in their normal peace stores. The Russian delegation proposed this same rule for the supply of fuel; but Great Britain and Japan opposed this vigorously, and demanded that the conference should adopt the rule most generally in force at present; that is to say, that belligerent ships should take on only enough fuel to enable them to reach the nearest port of their own country. This last rule, it was argued, requires only a simple mode of calculation, and does not impose on the neutral power any obligation to supervise the ship's destination.

The German delegation, on the other hand, stood for a greater extension of the privilege of coaling, and proposed that belligerents should be permitted to fill their bunkers entirely. After a long and apparently fruitless discussion, the Japanese delegation moved that no rule at all on the subject be adopted; but this motion was voted down, and a compromise was adopted, including *both* the British and the German proposition. Hence,

the rule reads as follows: Belligerent war ships may take on only enough fuel to enable them to reach the nearest port of their own country. They can, however, take on enough fuel to fill their bunkers, properly so called, when they are in the territory of neutral states which have adopted this rule regarding the supply of fuel.

In order to prevent frequent renewals of fuel supply in neutral ports, it was provided further that belligerent war ships can not take on a second supply in the same neutral territory less than three months after it has secured the first.

The British delegation attempted to procure the rule that "a neutral power must not knowingly permit a belligerent war ship within its jurisdiction to take on board munitions, food, or fuel, to go to meet its enemy or to engage in military operations." But this attempt met with decided failure, as a strong majority rejected the proposition as entailing too heavy a burden upon neutral states.

The next most difficult, and most debated, question was that of the length of stay of belligerent war ships in neutral ports. The Russian delegation proposed that the neutral state should be at liberty to determine the length of such stay. The British, Japanese, and Spanish delegations, on the other hand, proposed that the length of the stay be limited to twenty-four hours except in unusual cases. The Italian delegation proposed as a compromise between these two extremes, that the right of the neutral state to determine the stay should be affirmed, but that if any neutral state has not done so, then the time limit of twenty-four hours should be adhered to. This compromise received the votes in committee of Great Britain, Japan, and Portugal, against those of Germany

and Russia, and was finally adopted in the commission by a vote of thirty to four, with ten abstentions.

Germany and Russia struggled hard to prevent the adoption in any form of the twenty-four hours rule; and failing in this, they urged the adoption of the rule that belligerent war ships should not be permitted to remain more than twenty-four hours within neutral waters "situated within the immediate proximity of the theater of war." This last phrase was defined by the German delegation to mean the space of sea on which hostilities are occurring, or have just occurred, or on which hostilities may occur because of the presence or the approach of the armed forces of *two* belligerents. This would not include the case of an isolated cruiser exercising the right of capture or of visit, or the passage of a single belligerent's naval force. The argument advanced in support of this proposition was that it would restrict the need of watchfulness on the part of neutral states to a limited area of their coasts, which, in some cases, were very greatly extended. In illustration of this argument it was said that when a naval battle was imminent in the Indian Ocean, it would not then be necessary for the states of Northern Europe to watch their ports and roadsteads; or when the theater of war is in the Mediterranean, the coasts of the two Americas would have no need of a severe control.

The British delegation, in combating this proposition, emphasized the extreme difficulty of defining precisely the meaning of the terms "theater of war" and "immediate proximity," and the consequent difficulties and complications entailed by such vague terms upon neutral nations. It also contended that the capture of merchant ships *is* an act of hostility and would occur within a "theater of

war." It supported the twenty-four hours rule by arguing that, having been adopted by Great Britain forty-five years ago, and accepted by many other powers, it has proved its practicability; and that it has the great advantage for neutral powers of being a *definite* rule, easy of application by them.

The arguments of the British delegation prevailed, and the commission decided by a vote of thirty to two, with ten abstentions, to apply the twenty-four hours rule, "in default of other special regulations prescribed by the laws of the neutral state." As exceptions to the rule, it was admitted that, if a stay in a neutral port is caused by damages or by stress of weather, it may be prolonged beyond the legal limit, but only until the special cause of its delay is removed; and, also, that the rule does not apply to war ships engaged upon an exclusively scientific, religious, or charitable mission.

The length of stay in neutral ports raised again the inflammatory question of fuel, and again a warm debate occurred on the relation between them, in both committee and commission. The committee decided that the taking on of food and fuel should give no right to prolong the legal duration of the stay. But in the commission, Russia opposed this decision and, supported by Germany, argued that the rules already adopted were sufficiently severe, and that although large neutral powers have never prevented a belligerent ship from repleting its stores, small neutral powers might submit to pressure which they could not avoid. The British and Japanese delegations argued for the retention of the rule; but the commission, thinking, apparently, that since the Russian delegation had yielded on the twenty-four hours rule, the British

delegation should yield on this one, rejected the proposed rule by a vote of twenty-seven to five, with ten abstentions.

In some countries, as in Italy, for example, the law provides that a belligerent ship can not obtain coal until twenty-four hours after its arrival. On this account, the commission decided that, in such cases, the length of stay may be increased by twenty-four hours.

As to the maximum number of belligerent war ships admitted to a neutral port at the same time, it was readily agreed that the neutral state itself should determine this in advance; but that in default of such action on its part, the maximum number shall be three.

One further question arose in regard to belligerents in neutral ports. When the war ships of different belligerents are in a neutral port at the same time, what shall be the rule for their departure? Four different answers were proposed for this question: 1. that the neutral state should decide the order of their departure; 2. that the priority of request should determine it; 3. that the weaker ship should go first; and, 4. that the order of arrival should determine the order of departure. The last answer appeared to impose least responsibility upon the neutral state, and it was accordingly decided that the order of departure shall be determined by the order of arrival, unless the ship arriving first be in the condition where the prolongation of the legal stay is permissible; but it was decided that at least twenty-four hours must elapse between the departure of belligerent war ships of hostile powers. It was also decided that a belligerent war ship must not leave a neutral port or roadstead less than twenty-four hours after the departure of a merchant ship flying the flag of its adversary.

The United States naval delegate, Admiral Sperry, was a member of the committee of examination which had special charge of the subject of belligerents in neutral waters, and took a part, though not a prominent one, in the debate. He stated that the American view of the subject is inspired above all by respect for neutrality and impartiality. Great Britain's plan formed the basis of the rules adopted, but this was based partly upon the Treaty of Washington of 1871 between the United States and Great Britain. The United States delegation cast its vote with Great Britain's and against Germany's in the two most debated questions, those of the fuel supply and the length of the stay in neutral ports.

2. *Blockade*

The question of blockade was not discussed by the Conference of 1899, nor was it mentioned in the Russian programme of 1907. But Professor de Martens, of Russia, president of the IV Commission of the second conference, introduced it among the series of questions which he formulated as the basis of the commission's deliberations. His questions concerning it were as follows: "As to blockade in time of war, is there need of modifying the terms of the Maritime Declaration of Paris of 1856?[1] Is it desirable to state in a formal convention

[1] The Declaration of Paris of 1856 was issued by a congress representing France, Austria, Great Britain, Prussia, Russia, Sardinia [Italy], and Turkey. It contained the four following rules: 1. Privateering is, and shall remain, abolished; 2. A neutral flag covers the enemy's merchandise, with the exception of contraband of war; 3. Neutral merchandise, with the exception of contraband of war, can not be seized under the enemy's flag; 4. Blockades, to be obligatory, must be effective, that is to say, they must be maintained by a force sufficient really to prevent access to the coast of the enemy. This

the consequences, universally recognized, of the breaking of an effective blockade?"

In response to these questions, the Italian delegation presented a series of propositions designed to give as much liberty as possible to the commerce of neutrals with belligerents, by defining rigidly the meaning of an "effective" blockade, which alone, by the Declaration of Paris and the law of nations, can be considered binding upon neutral ships. In accordance with these propositions, a blockade is effective only when maintained by naval forces sufficient really to prevent the passage of ships, and stationed in such a way as to create an evident danger to ships which desire to attempt it.

The words *stationed* and *evident*, in the above definition, were designed to exclude blockade by cruisers and by submarine mines from the category of effective blockades, and were opposed, consequently, by Sir Ernest Satow, of Great Britain, who desired to substitute for them the words *maneuvering* and *real*.

The Italian propositions also aimed at the restriction of blockade by providing that a ship may be seized for violation of the blockade only at the moment when it is attempting to break the established lines. General Porter, of the United States delegation, opposed this restriction and proposed that any ship which, after a blockade has been duly announced, sets sail for a blockaded port or place, or which attempts to break the blockade, may be seized for violation of the blockade. The

declaration has been ratified by numerous other governments than those represented at the congress — by several at the Hague Conference of 1907 — but not by the United States; the reason why the United States has not ratified it has been that, while abolishing privateering, it did not abolish the capture of the enemy's, as well as neutrals', *private property* on the sea.

Netherlands representative opposed General Porter's proposition on the ground that it was in line with the old fictitious, or "paper," blockade which has been superseded for half a century by an "effective" blockade, and that by permitting the seizure of a ship anywhere on the ocean, and before it has really attempted to break the blockade, as well as on the lines of actual blockade, it would be an unjustifiable detriment to neutral commerce.

The Italian propositions were supported by Germany, Austria, the Netherlands, Turkey, and Greece, in Europe, and by Brazil and Argentina; while the British and American propositions were supported by Japan. In view of the marked difference between the "Continental" and the "Anglo-American" systems of blockade, and after a discussion of the question in both the commission and its special committee, it was decided that it was not possible for the existing conference to reach an agreement upon it. The committee, in reporting this decision to the commission, accompanied it with the hope that, in case of its further discussion being postponed, "a profound study of it by the governments may secure, in the near future, the sanction of a uniform practice which the commercial interests and the peace of the world demand."

The subject was not taken up again, but the conference evidently intended that it should be placed upon the programme of the next conference; for it is implied by the resolution adopted that the said programme shall include a regulation of the laws and customs of maritime warfare.

3. *Contraband of War*

This topic was not mentioned upon the Russian programme, but President de Martens, of the IV Commission, introduced it under the form of the following questions:

"Upon what is founded the right of belligerent powers to prohibit commerce in objects constituting contraband of war? Within what limits, of law and of fact, may this right be exercised by belligerents? Within what limits, of law and of fact, should this right be respected by neutrals?" In response to these questions, propositions were presented by the delegations of Great Britain, Germany, France, Brazil, and the United States.

The British proposition was the first to be presented, and was the most radical of all. It stated that the British government was "ready to abandon the principle of contraband in case of war between the Powers who shall sign a Convention to this effect"; and it provided that "the right of visit shall be exercised only for the purpose of proving the neutral character of the merchant ship." Lord Reay, of the British delegation, supported this proposition before the commission by a speech in which he argued that with changed conditions of warfare and commerce it has become the custom constantly to extend the definition of contraband of war, and thereby to increase the injury to neutral commerce; but that, at the same time, it has become increasingly more difficult, if not quite impossible, to prevent commerce in contraband. The enormous extension of transportation by land, thanks to steam railways; the progress of science which, by multiplying instruments of warfare on land and sea, has increased in an equal measure the number of articles

necessary for the operations of a fleet or an army; the great increase in the dimensions of a ship of modern commerce: such are the reasons why the old rules no longer accomplish the desired end of preventing neutrals from trafficking in contraband. Hence it is that the belligerent has been led to attempt the adaptation of old-time rules to modern conditions, and has only succeeded, in reality, in creating a condition of affairs which places excessive obstacles in the way of neutral commerce without gaining for himself an advantage equal to the wrong done to neutrals. Established usage permits at present a belligerent to declare, at the beginning of a war, what comprise the objects which he intends to treat as contraband of war, and to add others to the list in the course of hostilities. It is evidently in the interests of the belligerent to make a list as complete as possible, and it has often been done in terms so vague that the interests of neutral commerce have been injured beyond what is reasonable. After pointing out the difficulties of enforcement, and the danger to peaceful relations, of the present distinction between "absolute" and "conditional" contraband, — an argument which he based upon Great Britain's own experience as both belligerent and neutral since 1899, — Lord Reay appealed to the commission to adopt the British proposition, and thus to abolish "a frequent cause of international differences" and to "contribute to the work of peace and justice which is the object of our efforts."

The German, French, and United States delegations proposed to define more clearly the meaning and liability of absolute and conditional contraband; and the Brazilians proposed to abolish the distinction between absolute and

conditional contraband, and to make stated classes of articles alone subject to capture. These propositions were supported, and the British one opposed, by representatives of each of the four delegations, who endeavored to show that by their respective plans the principle of contraband would be retained, in justice to belligerents, and at the same time the rights of belligerents and the interests of commerce would be reconciled.

A number of the smaller powers,[1] on the other hand, gladly welcomed Great Britain's proposal, which seemed to them, in the words of the Marquis de Soveral, of Portugal, "a monument of profound wisdom and of great abnegation." After two sessions of the commission had been devoted to a discussion of the question, a vote was taken on the British proposition, which resulted in twenty-six for, five against, and four abstentions.[2]

After this noteworthy but not unanimous vote, the whole question was referred to a special committee for examination and report. Lord Reay was made chairman of this committee, which comprised representatives of three delegations which had voted for the British proposition, and of four which had voted against it.[3] In opening its discussions, Lord Reay said that "the British proposition to abandon the principle of contraband of war not having been accepted unanimously, the committee should seek in the other propositions submitted to the commission the elements of a general agreement on the question." Five sessions were devoted to the discussion of these propositions by the committee, which came to

[1] Sweden, Norway, Portugal, Switzerland, Belgium, and Argentina.

[2] Delegations opposed: Germany, United States, France, Russia, and Montenegro; abstentions: Turkey, Roumania, Panama, and Japan.

[3] Great Britain, Brazil, Chili; Germany, United States, France, Russia.

a practical agreement upon a list of twelve classes of articles which should be considered "absolute" contraband of war; but on the question of what should constitute "conditional" contraband, the committee could not reach any general agreement. This fact was reported to the commission which, in its report to the conference, expressed the belief that, in the general and sincere desire for a regulation satisfactory to every one, the question should be submitted to a renewed consideration on the part of the governments interested.

The conference itself, in plenary session, did not take up the subject specifically, but intended it to be included in its resolution that the elaboration of a code of the laws and customs of maritime warfare shall have a place on the programme of the next conference.

4. *Destruction of Neutral Prizes*

This subject was brought before the IV Commission by President de Martens's questions:

> "Is the destruction of merchant vessels, in time of war, under a neutral flag and loaded with troops or contraband of war, prohibited by legislation or by international practice? Is the destruction of all neutral prizes, by superior power, illegal according to legislation at present in force or according to the practice of naval warfare?"

In answer to these questions, the British delegation proposed that the destruction of a neutral prize by its captor be forbidden, and that the captor be required to release every neutral ship which he is unable to take before a prize court. The United States delegation submitted a similar rule: "If, for any reason whatever, a captured neutral vessel can not be brought to adjudication,

this vessel should be released." The Japanese delegation submitted the same rule as the British, but made the following exceptions: 1. if the vessel is in the military or naval service of the enemy, or under his control for military or naval purposes; 2. if the vessel forcibly resists visitation or capture; 3. if the vessel tries by flight to escape visitation or capture.

The Russian delegation, on the other hand, made the exception to the rule prohibiting destruction a very elastic one; it proposed that the exception should be made in those cases where the preservation of the captured ship "might compromise the safety of the captor or the success of his operations." The argument upon which the delegation based this broad exception was that "absolute prohibition of the destruction of neutral prizes by belligerents would have as a consequence the establishment of a position of marked inferiority for those powers having no naval bases beyond the coasts of their own countries." The Russian naval delegate, in a speech before the commission, illustrated this argument by reference to the case of a neutral vessel captured by a belligerent in close proximity to a superior naval force of the enemy, or at a long distance from the belligerent's ports, or when the belligerent's ports are blockaded by the enemy.

Sir Ernest Satow, of Great Britain, replied to the Russian argument by insisting that if a belligerent, because of geographical location or of the insufficiency of maritime resources, finds it impossible to exercise effectually the right of seizing neutral ships carrying contraband of war or seeking to violate a blockade, then he should leave them at liberty; for, to give to belligerents the right of sinking neutral prizes would lead inevitably to abuses and would

expose every neutral ship to the risk of being sunk every time it met a belligerent war ship, whose captain would not fail to exercise the right as seemed good to himself, despite the orders which he may have received to act circumspectly. By such a rule, the neutral vessel would find itself in the same position as an enemy's vessel; and its position would be even worse than that, since its government would have no means of redressing the wrong done it, short of itself declaring war on the belligerent captor.

The United States delegation supported the British view of the question; while the German delegation took the Russian side. Count Tornielli, of Italy, said that the absolute prohibition of the destruction of neutral prizes would probably be acceptable to powers with few or no widely scattered colonial ports and naval bases beyond the coasts of their own countries, provided permission be granted to belligerents to convoy their prizes into neutral ports, to be kept there under sequestration; he proposed, accordingly, that the two questions be discussed in a joint meeting of the two committees of the III and IV Commissions. This proposition was adopted; but the result of the joint meeting was the practical failure of both the prohibition of the destruction of neutral prizes and the permission to convoy them within neutral ports.[1]

The rule that neutral powers may admit to their ports prizes — either belligerent or neutral — was finally adopted by the conference; but it was deemed impossible to adopt any rule concerning the destruction of neutral prizes. Hence this latter subject, also, was left to be

[1] Eleven delegations voted for the prohibition, four against it, and two abstained; nine voted for the permission, two against it, and six abstained.

included within the programme of the next conference, under the head of the laws and customs of naval warfare.

E. THE LAWS AND CUSTOMS OF NAVAL WARFARE

a. The Conference of 1899

When the revision of the laws and customs of warfare on land was under discussion, Count Nigra, of the Italian delegation, endeavored to have extended to naval warfare the rules adopted in regard to bombardment on land; and Ambassador White and Captain Crozier, of the United States delegation, endeavored to have extended to naval warfare the rules adopted in regard to the treatment of private property on land. But the utmost that could be secured from the conference was the adoption, almost unanimously, of the desire that these two phases of naval warfare should be referred to the next conference. The great work of codification, accomplished by the Conference of 1899, was performed solely within the field of warfare on land; but its success in this field stimulated the Conference of 1907 in its noteworthy attempt to codify the laws and customs of warfare on the sea.

b. The Conference of 1907

The Russian programme for the Conference of 1907 included the following paragraph:

"As for maritime warfare, whose laws and customs differ on certain points from country to country, it is necessary to establish definite rules harmonious with the rights of belligerents and the interests of neutrals. A convention concerning these matters will have to be

elaborated, and it will form one of the most remarkable portions of the task devolved upon the approaching conference."

As parts of this convention, the programme mentioned the subjects of bombardment, mines, the transformation of merchant vessels into war ships, the private property of belligerents, the delay of favor accorded to merchant vessels at the beginning of hostilities, contraband, the conduct of belligerent war ships in neutral ports, and the destruction of neutral prizes. All of these subjects have been discussed above, and they form, of themselves, no small part of a naval code. After mentioning these, the programme continued: "In the said convention there should be introduced rules of warfare on land which would be applicable equally to warfare on the sea." And in outlining the work of the IV Commission, President de Martens's last question was: "Within what limits is the convention of 1899 relative to the laws and customs of warfare on land applicable to the operations of warfare on the sea?" This question, which necessarily involved a wide range of consideration, was not discussed by the commission itself, but referred to its committee of examination, which, in turn, referred it for consideration and report to Jonkheer van Karnebeek, of the Netherlands. This last-named gentleman, with the assistance of M. Beernaert, of Belgium, the president of the II Commission (which had to deal with questions of warfare on land), examined and reported upon the applicability of each one of the fifty-eight articles adopted in 1899 to control warfare upon land. He reported to the committee that forty-six of the fifty-eight articles were applicable, that four were not applicable, and that there was doubt as to the applica-

bility of the remaining eight. The committee decided that time would not admit of the discussion of the report by the existing conference;[1] and recommended that a special desire (*vœu*) be adopted in plenary session that the codification of maritime laws of combat be made a specific part of the programme of the next conference. This *vœu* was unanimously adopted, and, on motion of Sir Ernest Satow, of Great Britain, the further *vœu* was adopted that "meanwhile, the powers shall apply as far as possible to naval warfare the principles of the convention of 1899 relative to warfare on land."

[1] The report was not commenced until August 28, and presented to the committee until September 6.

XII. WARFARE ON LAND

A. NEW ARMS AND METHODS

a. The Conference of 1899

"From the moment when every chance of an armed conflict between nations can not be absolutely prevented, it becomes a great work for humanity to mitigate the horrors of war." These are the words by which President de Staal invited the attention of the conference to the subject of warfare on land. The Russian programme had mentioned two aspects of the subject, the use of new kinds of firearms and explosives, and the laws and customs of warfare. The first of these was taken up for discussion in the military subcommission of the I Commission. This discussion occupied five meetings of the subcommission, and was based upon propositions introduced, explained, and defended, for the most part, by Russia's military delegate, Colonel Gilinsky. These propositions had a precedent in the Convention of St. Petersburg of 1868, when the representatives of seventeen European powers met on the invitation of the Russian government and agreed upon a short "Declaration." This declaration asserted that the progress of civilization should have for its result all possible diminution of the calamities of war; that the only legitimate object of warfare is the weakening of the military forces of the enemy; that for this purpose it is enough to put *hors de combat* the largest

possible number of men; that this object would be exceeded by the use of weapons which would uselessly aggravate the sufferings of men put *hors de combat*, or which would make their death inevitable. The declaration was followed by an agreement between the contracting parties to renounce the use, in warfare with each other, of projectiles weighing less than four hundred grammes and being either explosive or charged with explosive or inflammable materials.

1. *Explosives*

In the spirit of this declaration and agreement Colonel Gilinsky presented to the conference several important propositions. The first of these was a proposal to restrict the use, in military operations, of the formidable explosives already existing, and to prohibit the use of still more powerful ones. Captain Crozier, of the United States, took the lead in opposing this proposition, and he did so on the ground that its adoption would be an obstacle to one of Russia's prime objects in calling the conference, that is to say, economy. If by a more powerful explosive is meant one which gives a greater velocity to a projectile of a given weight, or the same velocity to a heavier projectile, then an explosive is powerful in proportion to the volume of gas produced by the heat of combustion; hence it is quite possible to invent an explosive which, supplying a larger volume of gas at a lower temperature of combustion, would be more powerful than any now in use and, at the same time, because of the low temperature, would cause less strain upon the musket and permit its longer use. This argument was accepted as conclu-

sive, — although other arguments, unexpressed, were doubtless present in the thought of the delegates, — and it was unanimously voted that each state should be left in entire liberty as to the use of explosives for propelling missiles.

Colonel Gilinsky then proposed to prohibit the use of new explosives — that is, "high explosives," or those used as the bursting charge of projectiles — more powerful than any now used. This proposition was rejected, without discussion, by a vote of nine ayes and twelve noes.[1]

Colonel Gilinsky's third proposition was to prohibit the use, for field artillery, of bursting, or mining, shells. This proposition was also rejected, without discussion, by a vote of ten ayes and eleven noes.[2]

2. *Field Guns*

The Russian proposition on this topic was that the type of cannon at present in use in several armies, that is to say, the new rapid-fire cannon, should not be changed during a period to be agreed upon. Colonel Gilinsky based this proposition on the argument of economy, — "the reduction of the military expenses which burden the nations." But the representative of France said that if the proposition implied that those countries having inferior artillery could adopt the best now in use, it would entail even greater expenses upon them by inciting them

[1] All of the eight "great powers," except Russia, voted in the negative with Spain, Sweden and Norway, Denmark, Turkey, and Roumania.

[2] Denmark voted this time with the affirmative; the other negative votes were as before.

to place their equipment upon a plane of equality with the best.

A vote was taken, accordingly, upon such permission being given to the "backward" nations, with the result that five delegations voted aye,[1] and the other delegations either abstained from voting, or voted upon other phases of the question. As one of the delegates said: "It was impossible to state what the result of the vote was, — the only thing evident was that the question was not entirely understood by the voting delegates."

The president of the subcommission then put to a vote the proposition presented by Russia, with the result that all of the delegations voted against it, except that Russia and Bulgaria abstained from voting at all. Colonel Gilinsky afterwards explained that he had abstained from voting on the proposition because it had been made to imply that *no* state, even the backward ones, could introduce a better type of cannon than it already possessed; while he had intended it to mean that the new rapid-fire cannon should be considered the best type, and that no improvements on it should be permitted for a specified time.

The subcommission's report was accepted by the conference, and no further attempt was made to prohibit the use of improved field artillery.

3. *Muskets*

Colonel Gilinsky introduced his proposition as to muskets by saying that the musket at present in use in all armies is nearly of the same caliber and quality, and that therefore he would propose that a period be agreed upon

[1] Those of the United States, Italy, Belgium, Servia, and Siam.

during which no state should change the type of musket at present in use in its own armies. This proposition differed, it was noticed, from the Russian proposition regarding field artillery, since it would not permit "backward" nations to introduce improved types of muskets; but Colonel Gilinsky defended this difference on the ground that "the type of musket is very nearly the same at present in all armies, while the type of field artillery differs greatly." He supported his proposition entirely on the ground of economy, and said that it would not preclude new inventions designed to improve the existing type of musket, but merely those which would modify it essentially or transform it into an automatic musket. "The automatic musket," he added, "exists for the present only as a proposition, and has not yet been adopted anywhere."

In the discussion of this proposition, the objection was at once made, by General Zuccari, of Italy, that the difference between the muskets of different nations is not so small as stated, but that in reality it is quite great. And Colonel Kuepach, of Austria-Hungary, stated that an improvement, even a slight improvement, in muskets at present in use might change entirely their character or type. After a further exchange of views, it was agreed that the Russian delegates should present a detailed proposition specifying exact conditions. This they did, as follows:

1. The minimum weight of the musket shall be 4 kilogrammes.

2. The minimum caliber shall be $6\frac{1}{2}$ millimeters.

3. The weight of the bullet shall not be less than $10\frac{1}{2}$ grammes.

4. The initial vitality shall not exceed 720 meters.

5. The rapidity of firing shall be limited to 25 shots per minute.

Colonel von Schwarzhoff, of Germany, analyzed these conditions, and objected to the first on the ground of humanity to the soldier. "It is far more humane," he said, "to lighten the load which the soldier must carry, than to fix a minimum weight for one part of his equipment; all that is taken from the weight of the musket would soon be replaced by an increase in that of powder and shot." As to the minimum weight proposed for both musket and bullet, Colonel von Schwarzhoff stated that there were six governments which would be obliged by the plan to make changes, little desirable either from the military or economical point of view. The initial vitality, he said, depends at least as much on the powder used as on the kind or weight of the musket and the form of the projectile; and, since each power is to be left at liberty to adopt new explosives, it would seem logical not to limit the initial vitality. The rapidity of firing does not depend less, he argued, on the skill and training of the marksman than on the mechanism of the musket; hence, in fixing a maximum it would be necessary to state whether it is a moderate rapidity to which the majority of soldiers may attain, or a rapidity which the best trained men can not exceed. He admitted, however, that the proposed maximum was large enough.

A vote was then taken on the detailed proposition, with the result that fourteen delegations voted against it, four [1] for it, and two [2] abstained.

[1] The Netherlands, Persia, Russia, and Bulgaria.
[2] France, Roumania.

General den Beer Poortugael, of the Netherlands, had feared that the detailed proposition of Russia would meet with defeat, and before it was put to a vote he proposed a general agreement between the powers "to use in their armies, during the next five years, only the muskets in use at the present time"; and that "the improvements permitted should be of a kind to change neither the present type nor caliber." Colonel von Schwarzhoff opposed this proposition on the ground that it did not define what improvements should be permitted: "In case of doubt, it would be necessary, for the loyal fulfillment of the agreement, to make known the improvement to the other powers and ask their consent before adopting it, — an impossibility."

The proposition was put to a vote and lost by a vote of ten to ten, with one abstention.[1]

At the next session of the subcommission, General Poortugael presented another general proposition, similar to the first but including the proviso that the powers might adopt any improvement in the best existing type of musket which should appear advantageous to them, and that all the powers might adopt the best type then in use. He supported this proposition in an ardent speech which, by unanimous consent, was spread in full upon the minutes. He first explained that the reason why he had presented another proposition despite the adverse action taken on the two others, was that his conscience told him that they

[1] The four delegations which voted for the Russian detailed proposition, voted also for the Netherlands' general one; and in addition to these, the following delegations voted for the latter: Belgium, Denmark, Spain, Siam, Sweden and Norway, and Switzerland; France voted against the latter, and Roumania abstained; China, Mexico, Greece, and Luxemburg were absent; Montenegro, represented by Russia, did not vote.

should do all within their power to arrive at an agreement on the question of muskets; for, of all the questions submitted to the I Commission, that of muskets he believed to be the easiest of solution, since nearly all armies were in possession of good muskets of the same type.

"Gentlemen," he continued, "it is my belief that, not only from an economic point of view, but also from the point of view of statesmanship (*haute politique*), which is fortunately the same for every state, it is necessary and even urgent that we should do something.

"Whole populations, in every civilized land, expect that of us; it would be very sad to disappoint their hope. They ask, they beseech that a stop shall be put to throwing millions, nearly billions, into the gulf of incessant changes, which are made so rapidly that sometimes the weapon is changed three or four times before it is used. They ask, they beseech that a stop shall be put to the extravagant expenditures devoted to the implements of warfare, so that satisfaction can be given to the social needs which are growing more and more pressing and which, without money, must remain neglected. They ask, they beseech that we stop, if only for a time, and if only to take breath, in this frantic competition to hold the record for military inventions. At the very least, let us try to agree on the question which lends itself most readily to agreement; to do otherwise would be to deceive cruelly the nations.

"Let us discard all distrust, which is a bad counsellor. Let us not forget that in this very question of muskets, Russia, which made the original proposition, is equipped at present with a musket of large caliber, that of 7.62 millimeters, while neighboring states, Sweden and Norway and Roumania, have better muskets of a caliber of 6.5 millimeters. This, then, is an evident proof of disinterestedness, — a sacrifice, if you will, laid on the altar of the common welfare.

"Let us not forget that it is the generous thought of the young and august emperor of the largest empire in the world, who has revealed his desire for prolonged peace; that, in his journey in Palestine, another emperor, young, generous, and genial, at the head of the formidable power of Germany, solemnly expressed on the classic soil which we Christians call the Holy Land, his firm desire of main-

taining peace; and that, as all the world knows, the Emperor of Austria-Hungary, the illustrious sovereign who lately celebrated his jubilee in circumstances so sad, who lives only for the welfare of the peoples whom he governs, is animated by sentiments equally peaceful.

"Let us not forget, either, as the honorable President of the Conference, M. de Staal, has said, that 'the eagerness with which all the powers have accepted the proposition contained in the Russian circulars is the most eloquent proof of their unanimity with peaceful ideas.'

"In this state of things why do we hesitate, — we who have met here to give a body, so to speak, to these ideas, — why do we hesitate to do the minimum; that is to say, to agree that only for the short time of five years we will all keep the muskets that we have now, except that those states which have inferior muskets — those without magazine — may choose any existing type?

"If, gentlemen, after all that has happened and is expected, this conference, proudly announced and constituted, and unparalleled in history, accomplishes nothing in the way of economies so ardently desired, — if we place not a single restriction on the ruinous transformation of armaments, we shall forge weapons for the enemy common to all governments, for those who wish to revolutionize the established order of the world and who will not hesitate to scatter among the people venomous germs and a doubt as to the sincerity of the governments whom we represent. Those false prophets who make war only upon each other will say to the people: 'Come with us all you who are oppressed and who ask for bread and peace; we alone can give them to you.' And the people will throw themselves into their arms and will become their prey."

General Poortugael then endeavored to show that his proposition was free from the objections which had been made to the others, and in concluding his address, answered the objection that the various governments could not be trusted to introduce improvements without changing the type of their muskets, by saying:

"I take the liberty of replying as did the President of the Brussels Conference, Baron Jomini: 'It would be a wrong to the contracting

parties to imagine that they could have the intention of not abiding by their agreement.' Gentlemen, it is with nations as with individuals. Francis I, defeated and made prisoner at Pavia by Charles V, wrote to his mother from the Chateau de Pizzeghettone, these memorable words: 'Madame, all is lost but honor.' He did not cease to be 'the great king' when he had regained all that he had lost, because honor still stayed with him. But, far different would it be to forfeit an oath or an accepted agreement:

> "'Honor is like an isle with steep and landless shore;
> When once it has been lost, it can not be regained more.'

"I am convinced, then, gentlemen, that to be sure that the governments will evade neither the spirit nor the letter of the agreement, there is no better watchman than the nations' honor. Let us believe it!"

In reply to these glowing words, and after a motion to record, print, and distribute them had been passed, Colonel von Schwarzhoff said that as a simple technical delegate he was not in a position to follow General Poortugael into the domain of statesmanship (*la haute politique*). He admitted that after all the efforts made it would be very desirable to arrive at some agreement, but questioned if the plan proposed could secure it. The technical object, he said, is to realize economies or prevent new expenditures in the equipment of infantry; but since it was proposed to permit all the governments to introduce improvements in their muskets, the result would be, probably, a double expenditure: first, for the improvements during the five-year period, and then for a new type of musket. Besides, he argued, it would be possible by modifications, slight but expensive, to produce a weapon much superior to the existing musket, and this would oblige the other powers to keep pace with them.

General Poortugael in reply to these arguments said

that it was not very probable that, within the short time of five years, there would be need of making any considerable change in the existing musket; and that in any case there was a great difference between expenditures for improving the existing musket, which are usually but small, and expenditures for an entire change of arms, which requires three muskets for each man and costs, for an army of 500,000 infantrymen, the sum of $15,000,000.00.

General Sir John Ardagh, of Great Britain, stated that such an agreement would be very difficult to enforce; that, for example, a state might make a new type of musket in its own arsenals and distribute them to its soldiers only when war commenced. The Russian delegates replied that this objection would be met by the good faith of governments and by the control of public opinion, which was sufficient even in the case of commercial agreements. But Colonel von Schwarzhoff said that the difficulty would arise in good faith, and in regard to the question of what were merely improvements on the existing type and what were radical transformations.

The vote which followed this extended discussion resulted in ten ayes, three noes,[1] and eight abstentions.[2]

Five of the abstentions were due to lack of instructions from the home governments; and because of this fact, and of the lack of a more decided vote, the subcommission refrained from making any recommendation on the subject of muskets. When the report on the discussion was presented to the I Commission, the delegations from the United States, Austria, France, Japan, and Turkey added

[1] Germany, Italy, and Great Britain.

[2] The United States, Austria, France, Japan, Portugal, Switzerland, and Turkey.

their votes against General Poortugael's proposition; and, on the motion of M. van Karnebeek, of the Netherlands, the commission voted unanimously to leave the question to be studied carefully by the governments themselves, and to be discussed in another conference. This vote was adopted unanimously, with a few abstentions, by the conference, and the question did not arise again in 1899.

The attitude of the United States government towards the Russian proposition as to muskets was stated, early in the debate, by Captain Crozier, who said that it did not desire to limit itself in the case of new inventions having for their object the increase of efficiency in military weapons, although there was then no question of a change of small arms. The United States delegation took no further part in the debate, but cast its vote against the Russian and the two Netherlands propositions.

Still another question as to muskets was raised and voted upon, but not discussed. The Russian delegation proposed that the use of automatic muskets should be forbidden. Nine votes were cast in favor of this proposition, six votes against it,[1] and six delegations abstained.[2]

The question of prohibiting the use of new means of destruction depending on the application of chemistry or electricity was also raised in the subcommission, but not discussed by it, on the ground that it had not been mentioned in the Russian programme. When it came up in the commission, Colonel Gilinsky favored such prohibition for the reason that "Russia is of the opinion that the existing methods of making war are sufficient."

[1] Germany, Austria-Hungary, Italy, the United States, Great Britain, and Sweden and Norway.

[2] France, Japan, Portugal, Roumania, Servia, and Turkey.

Colonel von Schwarzhoff also admitted that the existing methods of making war were sufficient, but said: "We should not tie our hands in advance so that we should have to ignore more humane methods which may be invented in the future." This last argument was accepted by the commission, and the question was dropped without further discussion or vote.

4. *Bullets*

The Russian programme did not specify the subject of bullets; but when new arms and methods of warfare came up for discussion, Colonel Künzli, of Switzerland, inquired if it would not be appropriate to prohibit the use of projectiles which aggravate wounds and increase suffering, such, for example, as "dumdum" bullets. General Poortugael, of the Netherlands, then said that his government had instructed him to demand the formal prohibition of dumdum bullets, and defined them as inhuman projectiles which make incurable wounds; which have very soft points and very hard jackets, and, with a softer inner substance, explode within the body, thus causing a small hole on entering, but an enormous one on leaving, the body of the victim. Such damages, he asserted, are not necessary, for it is sufficient to render soldiers incapable of service for a time without mutilating them.

General Sir John Ardagh, of Great Britain, replied that a mistake had been made in attributing such consequences to dumdum bullets, for they were like other bullets, an ordinary projectile.

The president of the subcommission then said that a concrete proposition was prerequisite to any practical result, and requested Colonel Künzli to present such propo-

sition at the next meeting. Colonel Künzli did so as follows: "It is forbidden to use infantry projectiles, the point of whose jacket is perforated or filed, and those whose direct passage through the body is hindered by an empty interior or by one filled with soft lead." Colonel Gilinsky, of Russia, presented at the same time a resolution, which, amended by General Mounier, of France, was adopted by the conference and was as follows: "The contracting Powers prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with hard jackets, whose jacket does not entirely cover the core or has incisions in it."

When this latter proposition was made, it was accepted without debate by sixteen of the twenty delegations present; the delegates of the United States, Germany, and Roumania said that they believed it would be acceptable to their governments; and it was taken under consideration by the delegation of Great Britain. At the next meeting it was put to a formal vote and received nineteen ayes, and one no.[1]

In justification of his negative vote on the proposition, Sir John Ardagh, of Great Britain, demanded the liberty of using against savage populations effective projectiles, and said that, in civilized warfare, a soldier wounded by a ball of small caliber retires to an ambulance and advances no longer; but that in war against savages the case is very different: although penetrated two or three times, the savage does not summon hospital attendants, he does not stop marching forward, and before you have had time to

[1] The delegation from Great Britain voted in the negative; the Austrian delegation abstained from voting on this proposition because it had just proposed one more general in character, which provided for the prohibition of bullets that cause wounds unnecessarily cruel.

explain to him that he is in flagrant opposition to the decisions of the Conference of The Hague he cuts off your head. This distinction between civilized and savage warfare was denounced by M. Raffalovich, of Russia, as "contrary to the humanitarian spirit which rules this end of the Nineteenth Century: both the savage and the civilized enemy are men, and both deserve the same treatment." President Beernaert, of Belgium, before submitting the prohibitory proposition to a vote, also said that he believed that he expressed the opinion of the subcommission in asserting that no distinction should be made between enemies in battles.

Although in a minority of one to nineteen in the subcommission, Sir John Ardagh opposed the adoption of the proposition in the commission itself by reading an address, in part as follows:

"I ask permission to present to this Honorable Assembly some observations and explanations on a subject which has already been submitted to a vote, that is, the question of bullets. In the session of May 31, an article was accepted by a large majority against the use of bullets with a hard jacket, whose jacket does not entirely cover the core or has incisions in it.

"It seems to me that the use of these words describing technical details of construction will result in making the prohibition a little too general and absolute. It would not seem to admit of the exception which I would desire to provide for, that is, the present or future construction of some projectile with shock sufficient to stop the stricken soldier and put him immediately *hors de combat*, thus fulfilling the indispensable conditions of warfare without, on the other hand, causing useless suffering.

"The completely jacketed bullet of our Lee-Metford rifle is defective in this respect. It has been proven in one of our petty wars in India that a man perforated five times by these bullets was still able to walk a considerable distance to an English hospital to have

his wounds dressed. It was proven just recently, after the Battle of Om-Durman, that the large majority of the Dervishes who were able to save themselves by flight had been wounded by small English bullets, whereas the Remington and Martini of the Egyptian army sufficed to disable. It was necessary to find some more efficient means, and to meet this necessity in India, the projectile known under the name of *Dumdum* was made in the arsenal of that name near Calcutta.

"In the Dumdum bullet, the jacket leaves a small end of the core uncovered. The result of this modification is to produce a certain extension or convexity of the point and to cause a shock more pronounced than that given by the completely jacketed bullet, but at the same time less effective than that given by the bullet of the Enfield, Snider, or Martini rifles whose caliber is larger. The wounds made by this Dumdum bullet suffice ordinarily to cause a shock which stops an advancing soldier and puts him *hors de combat;* but their result is by no means designed with the aim of inflicting useless suffering. . . .

"It scarcely seems necessary for me to assert that public opinion in England would never sanction the use of a projectile which would cause useless suffering, and that every class of projectile of this nature is condemned in advance; but we claim the right and we recognize the duty of furnishing our soldiers with a projectile on whose result they may rely, — a projectile which will arrest, by its shock, the charge of an enemy and put him *hors de combat* immediately.

". . . In fact, it has been clearly proven that our completely jacketed bullet, such as is at present in use in the English army, does not sufficiently protect our soldiers against the charge of a determined enemy; hence we desire to reserve entire liberty to introduce modifications in the construction of either the jacket or the core, for the purpose of causing the shock necessary for putting a man *hors de combat,* without occasioning useless aggravation of suffering.

"Such is our point of view, and we can not, consequently, accept the wording of the prohibition voted by the majority on the first reading, which imposes a technical restraint on details of construction.

"Nevertheless, I desire to repeat that we are completely in accord with the humanitarian principles proclaimed in the Convention of

St. Petersburg, and that we shall endeavor to observe them, not only in their letter, but in their spirit also, in seeking a solution of the problem as to what kind of projectile we shall adopt. I can assure this Honorable Assembly that it is very disagreeable to me to find myself obliged to vote, for the reasons which I have just explained, against a rule inspired by principles of which I wholly approve; and I still cherish the hope that it will be possible to arrive at a unanimous agreement, by means of a phraseology which shall leave aside technical details of construction and affirm the principles on which we are all agreed, — the principles enunciated in the Convention of St. Petersburg; that is to say, the prohibition of the use of bullets whose effect is to aggravate uselessly the sufferings of men placed *hors de combat*, or to render their death inevitable."

Captain Crozier, of the United States, came to the aid of General Ardagh and proposed that the rule be phrased in the following manner: "The use of bullets which inflict uselessly cruel wounds, such as explosive bullets and, in general, every kind of bullets which exceed the limit necessary for putting a man immediately *hors de combat*, is forbidden."

Both the British and American propositions were opposed by the members of various delegations on the ground that they were too vague and general to be effective, — more vague, in fact, than the Declaration of St. Petersburg which had been issued a generation before.

The proposition which had been voted by the subcommission by a vote of nineteen to one, with one abstention, was then put to a vote in the commission and adopted by twenty ayes, two noes (Great Britain and the United States), and one abstention (Portugal).[1]

When the proposition was reported by the commission to the conference in plenary session, Captain Crozier, of

[1] The representatives of China, Luxemburg, and Mexico were not present.

the United States, presented the following arguments against its final adoption:[1] First, that it forbade the use of expanding bullets, notwithstanding the possibility that they might be made to expand in such regular manner as to assume simply the form of a larger caliber, which property it might be necessary to take advantage of, if it should in the future be found desirable to adopt a musket of very much smaller caliber than any now actually in use. Second, that by thus prohibiting what might be the most humane method of increasing the shocking power of a bullet and limiting the prohibition to expanding and flattening bullets, it might lead to the adoption of one of much more cruel character than that prohibited. Third, that it condemned by designed implication, without even the introduction of any evidence against it, the use of a bullet actually employed by the army of a civilized nation.

After the Russian and Netherlands military representatives had replied to the arguments of Captain Crozier, Ambassador White and Captain Mahan, both of the United States, supported the proposition presented by Captain Crozier, and demanded that it be voted upon first, as an amendment to the proposition adopted by the commission. Its opponents insisted that it was not an "amendment," but a "new proposition," and that therefore the former proposition should be voted upon first. This question of priority was submitted to a vote, with the result that seventeen delegations voted in favor of the first proposition's priority, and eight delegations voted in favor of the American proposition's priority. The former proposition, as submitted from the commission, was ac-

[1] This statement is taken from Captain Crozier's report to the United States delegation.

cordingly voted upon, with the result that twenty-two delegations voted in favor of it, two delegations (Great Britain and the United States) voted against it, and one (Portugal) abstained from voting, while Luxemburg's delegation was not present.

The final declaration adopted by the conference, after a long and animated debate upon it in subcommission, commission, and plenary session, was in the form of the original proposition, and was signed by representatives of all of the twenty-six powers, with the exception of Great Britain, the United States, and Portugal.[1]

b. The Conference of 1907

Bullets

The Russian programme for this conference mentioned, among the topics connected with warfare on the land: "Declarations of 1899. One among them having expired, question of its renewal."

At the second meeting of the first subcommission of the II Commission, on July 10, 1907, General Davis, of the United States, presented the following proposition: "The use of bullets which inflict unnecessarily cruel wounds, such as explosive bullets, and, in general, every kind of bullet which exceeds the limit necessary for putting a man immediately *hors de combat*, should be forbidden."

At the last meeting of the subcommission, August 7, after the other work assigned to it had been finished, its president, M. Beernaert, of Belgium, stated that the

[1] The British and Portuguese delegations in the Conference of 1907 announced the adhesion of their governments to this declaration.

Convention of 1899 had been completed by two other declarations, one relative to the prohibition of bullets which expand in the human body, and the other dealing with the prohibition of asphyxiating projectiles; and that no one had demanded the revision of these two declarations.

Lord Reay, of Great Britain, then announced that his government, which did not sign the latter declaration, would give in its adhesion to it that day.

The president, after expressing his gratification for this adhesion, passed to the declaration concerning bullets. He expressed his opinion that all discussion on the subject of this declaration should be held, as in the case of the preceding one, inadmissible; that these two declarations, having been concluded for an indefinite term, can be *denounced* only on condition of notice given one year in advance, and that no power had expressed such an intention; that, moreover, the modification or abrogation of these declarations does not figure on the programme, and that the restrictive proposition of the United States, likewise, is not a part of it.

These observations of the president encountered no contradiction; and after the British and Portuguese representatives had announced that their respective delegations would sign the declaration prohibiting the use of bullets which expand or flatten easily in the human body, and the president had congratulated the conference "on these precious adhesions," the subcommission adjourned *sine die.*

The adhesion of Great Britain and Portugal to the declaration of 1899 concerning bullets left the United States delegation alone to contend for its view of the matter. It did not shirk what it considered to be its duty, and at the

meeting of the II Commission on the 8th of August, General Davis recalled some of the facts above mentioned, and made the following statement:

"In view of these facts, the United States delegation finds it difficult to understand 'that no one has demanded the revision of these two declarations.' Its desire in submitting its proposition of July 8 was to secure consideration for it by the commission.

"In the minutes of July 31, there was given an interpretation to the programme, an interpretation which the delegation of the United States, to its great regret, can not accept; the interpretation, namely, that the declarations of 1899 can be modified only at the suggestion of a power which has denounced them. The government of the United States is not one of the signatories of the third declaration, and hence is not in a position to denounce it in the manner and form prescribed in the convention. . . .

"In conclusion, I address myself especially to the delegates who bear officers' commissions in the armies of the nations represented here. You are familiar with the whistling of bullets, you are accustomed to the sight of the dead and wounded. We have regulated the operations of warfare, we have improved the condition of neutrals: these are acts of high justice; but we should not forget the combatant officers and simple soldiers who bear the burdens of warfare. I hope that this conference, convoked in the name of humanity, will not forget the lot of those who bear the inevitable losses and the cruelties of battles.

"The duty of the delegation of the United States has been fulfilled; the duty of the conference commences at the point where that of the delegation ends."

M. Beernaert, of Belgium, who was president of the II Commission, as well as of its first subcommission, replied that General Davis's remarks would be placed upon the record, but said that the question raised by him had been placed before the commission [really, the subcommission], and that no one had opposed the solution which it had received. He ruled that the question was no longer open for

discussion, and expressed the opinion that in other respects also it had been well settled. The programme prepared for the conference more than a year ago by the Russian government, he asserted, included the regulation of warfare and the renewal of the declaration relative to balloons; but no proposition was made as to the two other declarations, and no power had denounced them; hence they retain their obligatory force for one year or more. In regard to General Davis's proposition itself, M. Beernaert said, in conclusion, that it was identical with the one presented by Captain Crozier in 1899, which was then unanimously rejected as insufficient; and that Captain Crozier himself then signed the declaration in its present form.[1]

The commission then adjourned, and the question of bullets was not taken up again.

B. THE GENEVA CONVENTION OF 1864

a. The Conference of 1899

When the II Commission was assigning its tasks to the consideration of its two subcommissions, a debate occurred as to the competence of the conference to revise the convention adopted at Geneva in 1864 for the regulation of warfare on the land. M. Odier, of Switzerland, took the view that it would be better to refer the revision to a special conference, in which medical and sanitary experts, and representatives of all the powers which had signed the convention,[2] might be present. This view was adopted

[1] The last two of these statements were incorrect, — according to the official record of 1899.

[2] All of these powers were represented in the Conference of 1899; but some of the minor German states which were independently represented in 1864 were represented in 1899 by delegates from the German Empire.

by the commission, although the sentiment was expressed by M. Asser, of the Netherlands, that the existing conference would have the *right*, even though it might be deemed inexpedient to exert the right, of revising the said convention.

M. Asser, as president of the subcommission which dealt with the application of the Geneva rules to maritime warfare, proposed to the subcommission the adoption of the following desire (*vœu*):

"The Conference of The Hague, taking into consideration the preliminary measures initiated by the federal government of Switzerland for the revision of the Convention of Geneva, expresses the desire that, after a short interval, there shall be convoked a special conference, whose object shall be the revision of the said convention."

When this desire was reported to the commission, M. Beldiman, of Roumania, moved to add, after the words "a short interval," the words "and under the auspices of the Swiss Federal Council." In making this motion, he recalled that Switzerland has acquired an imperishable claim to the gratitude of the civilized world for all that concerns the establishment and development of the Red Cross, and suggested that just homage would be rendered to Switzerland by the adoption of his amendment.

The commission's president, M. de Martens, of Russia, said that it would impose a burden upon the Swiss government to decide that it alone had the right of convoking the Conference of Revision; and he cited a precedent of 1892 to show that Switzerland had not always taken precedence in regard to the Red Cross movement. M. Asser, of the Netherlands, and Sir Julian Pauncefote, of Great Britain, supported M. de Martens's view, while representatives of Germany, Japan, and Italy supported M. Beldiman's mo-

tion. M. Odier, of Switzerland, said that, while he agreed entirely with the view that his government could not claim to monopolize the convocation of the proposed conference, yet, since the idea of the Convention of Geneva had been born in his country, he considered that up to a certain point it had an interest and a particular right to take the initiative in all that pertains to that convention.

After this rather unpleasant discussion, M. Beldiman's amendment was put to a vote, with the result that thirteen delegations voted for it, twelve delegations abstained from voting, and one delegation (that of the United States) voted against it. The desire as presented by M. Asser was then passed by a vote of twenty-two ayes and four abstentions.

At the next meeting of the commission, Captain Mahan said that the delegation of the United States had received instructions from its government to vote for the amendment offered by M. Beldiman, and that it desired, therefore, to change its negative vote to an affirmative one. M. Beldiman thereupon said that his amendment had been adopted by a majority vote; but that in the interest of unanimity, he would move that the desire as presented to the commission should be recommended to the conference in plenary session, with the further declaration that all the states represented at The Hague would be happy to see the Federal Council of Switzerland take the initiative, after a short interval, in convoking the proposed Conference of Revision.

Ambassador White, of the United States, announced that the negative vote cast by his delegation at the last meeting had been the result of a misunderstanding, and that the American government had the liveliest desire to do justice to Switzerland, which had taken the initiative in developing this great humanitarian idea; he would vote, therefore, for

M. Beldiman's motion. This motion was then adopted unanimously, on the understanding, as expressed by the commission's president, that no nation was bound in any way by the adoption of the motion, and that no mandate was laid upon Switzerland by it.

The conference in plenary session approved unanimously, and without discussion, of the commission's recommendation.

The laws and customs of warfare on land, adopted by the conference, included the provision that the obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention of August 22, 1864, subject to any modifications which may be introduced into it.[1]

b. The Revision of 1906[2]

Although the Geneva Convention was revised by a special conference in 1906, and not by the Peace Conference of 1907, it seems appropriate to give a brief account of the revision in this place. For not only was the special conference of revision inspired largely by the first Peace Conference, but the revision itself became the basis of the work of the second Peace Conference in its further adaptation of the Geneva Convention to naval warfare.

The Swiss Federal Government issued the invitations and the proposed programme for the conference, which met in Geneva from the 11th of June to the 6th of July, 1906. Thirty-four of the thirty-nine independent countries

[1] Article 21. For this code of laws, see later, page 213.

[2] The following account is based upon the official report of the conference, published by the Swiss government in Geneva in 1906, and entitled "Actes de la Conférence de Revision réunie à Genève du 11 Juin au 6 Juillet 1906" (one volume, 311 pages, folio).

which had signed the Convention of Geneva, and two others, were represented in the conference by seventy-nine members, who were about equally divided between the diplomatic, military, and medical professions.

The convention adopted by this conference bears the date of July 6, 1906, and takes the place of the Convention of 1864. It contains thirty-three articles, instead of the original ten. The most important amendments and additions adopted are as follows:

Not only soldiers (*militaires*), but also "other persons officially connected with the armies," are now to be cared for, when sick or wounded, by the victorious army.

Sick and wounded, in the hands of the enemy, are now considered prisoners of war; but belligerents are left free to make mutual agreements to exchange such prisoners, to return to their own country those whom they do not desire to retain, or to send them to a neutral country, with the latter's consent, to be confined until the end of hostilities.

The victorious army is required to take measures to seek out the wounded on the field of battle, and to protect them against pillage and ill treatment. This protection must be extended to the dead also, who are not mentioned in the Convention of 1864; and before they are buried or cremated, bodies must be carefully examined for any remnant of life.

Belligerents are required to inform each other of the marks of identity found on the dead, and of the *état nominatif* (name, regiment, company, etc.) of the sick or wounded received by them. They must keep each other informed of burial, death, and reception in hospitals of the sick and wounded in their power. They must receive the personal property, letters, etc., found on the field of battle,

or left by those who die in hospitals, and return them through official means to those who have an interest in them.

The Convention of 1864 provided that "every wounded soldier received and cared for in a house shall protect it; and inhabitants who receive sick and wounded in their homes shall be exempt from lodging troops and from a portion of the military contributions which may be imposed." This was regarded by the Conference of 1906 as an incentive to fraud and deception on the part of such inhabitants, and a source of just criticism of the convention itself. It therefore substituted the rule that "the military authority may appeal to the charitable zeal of the inhabitants to receive and care for the sick and wounded, under its own control, and to accord to those who respond to this appeal a special protection and certain immunities."

Movable, as well as immovable, hospitals are now to be protected by belligerents, provided they are not used to commit acts injurious to the enemy; and such acts are, by a process of exclusion, carefully defined.

The Convention of 1864 provided that the personnel of hospitals and ambulances shall participate in the benefits of neutrality *when they are performing their duties* as caretakers of the sick and wounded. The Convention of 1906 provided that such personnel, if assigned exclusively to such duties, shall be protected *under all circumstances;* and that if they fall into the hands of the enemy, they shall not be treated as prisoners of war.

Voluntary associations for the aid of sick and wounded soldiers, such as the Red Cross societies of to-day, were in their infancy in 1864, when the Convention of Geneva was adopted, and the character and results of their opera-

tions could not be certainly foreseen; hence they were not recognized by that convention, or by the additional articles of 1868. But these societies have proven their efficiency and helpfulness in such a striking manner during the wars of the last generation, that the Conference of 1906 gladly recognized them, and provided that, if duly recognized and authorized by their own governments, their agents should share the same protection and privileges as are accorded to the hospital personnel of the governments themselves. Before they begin operations, however, their names should be notified by their respective governments to each other; and their agents on the field of battle are subjected to military laws and regulations. Such a society, belonging to a neutral country, can not participate in the work of caring for the sick and wounded of a belligerent without the definite consent of its own government and the authorization of the belligerent as well; and the belligerent which accepts of an offer of such services must notify its opponent of that fact before the services are rendered.

All sanitary officials who fall into the enemy's hands must not be treated as prisoners of war, but may continue to perform their duties under the enemy's direction and with his compensation. When their services are no longer indispensable, they, together with their private property, instruments, arms, and horses, are to be returned to their own army or country, as soon as military necessities permit.

The Convention of 1864 contained the broad provision that "evacuations, together with the persons directing them, shall be covered by an absolute neutrality." This protection is recognized by the Convention of 1906, but under limitations designed to give greater freedom to military operations; for example, "a belligerent, intercepting a

convoy of evacuation, may arrest it, if military necessities demand, provided that he take care of the sick and wounded which it convoys."

The "red cross on a white ground," adopted as the distinctive emblem of hospitals, etc., in 1864, was retained in 1906; but, in order to emphasize the fact that the use has only a humanitarian, and not necessarily a religious, theological, or ecclesiastical significance, the rule was stated as follows: "Out of respect to Switzerland, the heraldic sign of the red cross on a white ground, formed by the inversion of the federal colors, is retained as the emblem and distinctive sign of the sanitary service of armies." This emblem is to figure on the flags, arm bands, and all the material belonging to the sanitary service. It is to be worn on an arm band on the left arm, by the agents of the sanitary service, who are to carry also a certificate of identification; both the arm band and certificate are to be supplied and stamped by the competent military authority.

The distinctive flag of the Red Cross can be hoisted over only sanitary establishments and with the consent of the military authority. It should be accompanied by the national flag of the belligerent to whom the establishment belongs. But if military hospitals fall into the hands of the enemy, they should hoist no other flag than that of the Red Cross, so long as they are in such situation. The sanitary establishments of neutrals should hoist, with the flag of the convention, the national flag of the belligerent with whom they take service; and if they fall into the enemy's hands, they should hoist only the convention's flag, so long as they are in such situation.

The emblem of the red cross on a white ground, and the words *Red Cross* or *Cross of Geneva*, can be employed

whether in time of peace or in war time, only to protect or to designate the sanitary establishments, their personnel and equipment, which are protected by the convention. The signatory governments undertake to pass, or propose to their legislatures, laws sufficient to prevent at all times the said emblem and words from being used by individuals or societies other than those to whom the convention gives the right of so doing. This agreement was adopted for the expressed purpose of preventing a commercial use of the red cross emblem or words as a mark of manufacture or trade; and it was agreed that if the several governments did not secure requisite legislation for this purpose, the convention itself would be held to prohibit as illegal such use of the emblem and words.

Although there was a good deal of debate over the adoption of the thirty-three articles of the convention, the delegates from all the countries represented signed them all, with the exception of the three which forbade the use of the red cross emblem and words for any other purpose than that recognized by the convention. The British delegation alone withheld their signatures from these three articles, and they did so for the twofold reason that five or six years are necessary in Great Britain to pass a law, even a popular one, and that they were unwilling to promise that their government should undertake to pass any law.

There was one other measure adopted by the conference which lacked unanimity. This was not an article of the convention, but was the expression of the following desire (*vœu*):

"The conference expresses the desire that, for the purpose of securing an interpretation and application as exact as possible of the

Convention of Geneva, the contracting powers shall submit to the Permanent Court at The Hague, if the cases and circumstances admit of such a procedure, the differences which, in time of peace, may arise between them in regard to the interpretation of the said convention."

The original of this proposition was made in the name of the government of Russia by Professor de Martens; it was amended by M. von Bülow, of Germany; and was supported by a number of delegates from other countries. M. von Bülow expressed the prevailing sentiment in the words:

"I am convinced that we can all adhere to this *vœu*, and thus give to the world a fine proof of concord and harmony at the end of our humanitarian task. The Convention of Geneva and that of The Hague are sisters, destined to walk together along the path of civilization towards the triumph of justice and humanity."

All of the thirty-six delegations present in the conference voted for this *vœu*, with the exception of those of Corea, Great Britain, and Japan.

C. THE RIGHTS AND DUTIES OF NEUTRALS

a. The Conference of 1899

When the laws and customs of warfare on land were under discussion in the military subcommission of the II Commission, and the question of belligerents harbored by neutrals came up for consideration, M. Eyschen, of Luxemburg, seized the opportunity to emphasize the indefinite status of the rights and duties of neutrals in international law. He asserted that a precise definition of these rights and duties would be to the advantage of both neutrals and belligerents, and would facilitate the task in war time of

governments, parliaments, the press, and of every one else concerned.

A number of delegates gave hearty support to the importance and necessity of the task indicated by M. Eyschen, and the subcommission requested him to lay before it a statement of the precise points which might be considered by it with a definite result.

M. Eyschen performed this task at the next meeting, and in justification of the initiative which he as a representative of Luxemburg had taken in the matter, spoke of the peculiar situation in which Luxemburg had been placed by the Treaty of London of 1867. "That treaty," he said, "had desired to relieve Luxemburg of its former strategic importance. It decreed that Luxemburg should cease to be fortified; that from being a fortress it should be converted into an open place; that its fortifications should not be restored in the future; and that there should be neither maintained nor created in it any military establishment whatever. The country itself can have only the number of troops necessary to preserve good order."

The subcommission was again greatly impressed by the importance of the subject thus introduced; but, on consideration, it shared the doubts of President de Martens as to the possibility of accomplishing in a few weeks a task which the most eminent jurisconsults, like, for example, those of the Institute of International Law, had been unable to accomplish in the course of a quarter century. It adopted unanimously, however, the desire (*vœu*) that "the question of the rights and duties of neutrals be inscribed on the programme of the next conference." This desire was adopted unanimously and without discussion by the commission and

the conference in plenary session; and the only phases of the question which were discussed and settled by the first conference had to do with the relation of belligerents in occupied territory to the property of railways coming into that territory from neutral states, and with the relation of neutral states to sick and wounded belligerents received within their territory. These rules, five in number, are given together with the rules regarding neutral rights and duties which were adopted by the Conference of 1907.

b. The Conference of 1907

In compliance with the *desire* of the Conference of 1899, the Russian government placed upon its programme for 1907 the elaboration of a convention stating the rights and duties of neutrals on land. The subject was brought forward in a proposition containing four articles by the French delegation, and General Amourel, of that delegation, in presenting it said that it did not of course provide for everything needed, and that the powers would be obliged to add to it some regulations determining all the conditions in which they expected to exercise their neutrality; but that the adoption of the proposed rules would afford a point of departure, a definite basis, the same for all powers, well known in advance, and having the great advantage of originating in a free and calm discussion.

The convention which was adopted as the result of this discussion is divided into two parts: first, the rights and duties of neutral *states*, in relation to belligerents in time of war; and, second, the rights and duties of the *citizens* of neutral states residing within belligerent territory.

1. *The Rights and Duties of Neutral States*

The first article adopted was the fundamental assertion that the territory of neutral states is inviolable. This was adopted unanimously, and was intended to emphasize the fact that neutrals have most important rights, in relation to belligerents, as well as duties.

In pursuance of this fundamental idea, certain acts are first forbidden to belligerents, and then it is stated that a neutral power should not tolerate their performance on its own territory. These acts are: first, to convey across a neutral's territory troops or convoys either of munitions or provisions; second, to install on a neutral's territory a radio-telegraphic station, or any other apparatus designed to serve as a means of communication with belligerent forces on land or sea; third, to make use of any plant of the kind just mentioned established by belligerents before the war on a neutral's territory for an exclusively military purpose and not opened to the service of the public; and fourth, to form corps of combatants or open offices of enrollment for the advantage of belligerents on a neutral's territory.

While stating that the above acts should not be tolerated by a neutral power, the convention proceeds to define carefully the neutral's responsibility in regard to them. A neutral power is required to punish acts contrary to neutrality only when such acts have been committed on its own territory; it is not responsible for the passage of individuals, separately, across its frontier for the purpose of enlisting in the service of one of the belligerents; it is not required to prevent the exportation or transit, on account of either of the belligerents, of arms, munitions, or anything

which may be useful to an army or a fleet; and it is not required to prohibit or restrict the use, for belligerents, of telegraph or telephone systems, or of wireless telegraph stations, whether they be the property of the neutral state itself or of private companies or individuals. The neutral power *may* impose restrictions or prohibitions upon the exportation of arms, etc., to belligerents, and upon the use by them of telegraph systems, etc.; but it is expected to apply such restrictions or prohibitions impartially to each belligerent, and to require private companies or individuals owning telegraphic and telephonic systems to apply regulations impartially to each belligerent.

The convention not only admits the right of a neutral power to repel attacks upon its neutrality, even by force, if necessary, but also expressly states that such repulsion can not be considered a hostile act.

These important rules were not adopted without debate. The limitation of a neutral's responsibility to acts committed *within its own territory* was opposed as being insufficient. The Japanese delegation desired to substitute for this the words *under its jurisdiction*, so that it could be held responsible for acts committed within lands under its protection, — that is, in so-called "protectorates," such as, for example, Manchuria before the recent Russo-Japanese War. The Turkish delegation desired to make the neutral state responsible for the emigration of individuals who, just beyond the neutral frontier, should form a military organization for the purpose of participating in the war. The German delegation desired to require neutral states to prohibit their citizens from enlisting for service in the armies of either belligerent. But the commission rejected all of these restrictions on neutral rights, and made

neutral states responsible only for acts committed within their own territories. It did, however, concede that their responsibility extended to acts committed within their own territories by *aliens*, as well as by citizens; and it informally approved the assertion that, so far as "protectorates" were concerned, "the material reality of facts alone can supply a criterion for determining the neutral state virtually responsible and the extent of its responsibility."

The commission rejected the Japanese and British proposition to require neutral states to restrict or prohibit the use, for belligerents, of telegraphic or telephonic means of communication; it did so for the reason that no argument based on principle was advanced in support of such a requirement, while arguments of a practical nature, such as interference with the privacy and rapidity of such communication, were advanced against it. On motion of Lord Reay, of Great Britain, however, the commission did adopt the principle that the liberty of a neutral state to transmit dispatches by means of its telegraphic systems on land, its submarine cables, or its radio-telegraphic apparatus, does not imply the faculty of using them or permitting their use to lend manifest assistance to one of the belligerents.

The relation of neutral states towards belligerents admitted within their territories, and towards the sick and wounded, is carefully defined.[1] A neutral power which receives within its territory belligerent troops should assign them a place of residence as far as possible from the seat of war; it can keep them in camps, and even confine them within fortresses or in places suitable to the purpose; it

[1] Four of the five articles regulating this matter were adopted in 1899, under the Laws and Customs of Warfare on Land.

will decide whether or not officers may be set at liberty on promise not to leave the neutral territory without authorization; in default of a special treaty, it will supply such belligerents with food, clothing, and such comforts as humanity prescribes; and it shall receive compensation for its expenses after peace is made.

As to prisoners of war, it is provided[1] that a neutral power which receives prisoners of war who have escaped from captivity must leave them at liberty, but can assign them a residence, if it tolerates their stay within its territory; and the same rule applies to prisoners of war who are brought into neutral territory by troops taking refuge there.

The sick and wounded soldiers of belligerent armies may be authorized by a neutral power to be brought within its territory, on condition that neither personnel nor material of war be brought in with them; and whether they are brought in by their own side or by their enemy, they should be prevented by the neutral power from taking part again in the operations of the war.

It was admitted without debate that prisoners of war escaping to a neutral territory should be left at liberty; but there was opposition to the application of this rule to those prisoners of war who are brought into a neutral territory by troops taking refuge there. The Russian delegation urged against this measure the arguments that for a neutral state to liberate captives would be to give an advantage to one of the belligerents, and hence be a breach of neutrality; that a neutral state would be able to do for one belligerent what it was unable to do for itself on the field of battle, — that is, release the captive soldiers belonging to it; and that it would be illogical to permit

[1] By Article 13, the additional article adopted in 1907.

able-bodied prisoners of war to go at liberty, while sick and wounded prisoners of war are required to be prevented by the neutral power caring for them from participating again in the war. In reply to these arguments, it was urged that the captors who had become fugitives in a neutral territory had probably escaped the necessity of surrendering their prisoners; that a neutral state should not be required or permitted to prevent a victorious belligerent from regaining its soldiers who had been captured; that a neutral's territory is inviolable, and can not be made the scene of any warlike operation between belligerents, — such as that of keeping soldiers in captivity; and that the sick and wounded soldiers required by the convention to be prevented from participating in the war again are such as are voluntarily confided to the neutral power by a belligerent who is not himself a fugitive from the field of battle. The latter arguments were accepted as conclusive, and the rule was adopted by a vote of thirty-one to three, with two abstentions.

The rule that a neutral power should prevent sick and wounded soldiers from participating in the war again, is based on the assumption that the belligerent who confides them to the neutral's care is thereby enabled to relieve himself of incumbrances and thus secure the mobility requisite for his military tasks. This relief is permitted for humanitarian reasons, but it should not be to the ulterior profit of the belligerent to whom the sick and wounded belong.

2. *Neutrals within Belligerent Territory*

The rights and duties of neutrals residing within the territory of belligerents were discussed upon the basis

of a series of propositions presented by the delegation of Germany. Baron von Bieberstein, in presenting them to the subcommission, said that they dealt with a kind of questions in regard to which disputes are particularly frequent.

"In the majority of states," he said, "there are hundreds of thousands of inhabitants belonging to another nationality, who, for various reasons, have come to settle for a longer or shorter time in a foreign land. There are others who, while not residing in the foreign country, are interested in some business enterprise, and own lands or other wealth within it. The interests of all these people are affected from the moment when the state which accords them its hospitality becomes engaged in war.

"What is then their position with respect to the belligerents? What treatment shall they receive? Can they be enrolled in the ranks of the belligerents' armies, and render to them other personal services in promoting the war? Have they a right to indemnity if, in the course of the hostilities, their lands are devastated, their property destroyed? And should they contribute to the supply of the military wants of the belligerents?

". . . For the majority of these questions, the principles applied by the various governments are not harmonious, and, in each war, this discord gives rise to disputes between the belligerents and the neutral states protecting the claims of their subjects.

"It would seem desirable, then, to put an end to this uncertainty by adopting rules which, while not disregarding military necessities, shall recognize the just claims of neutral states."

Lord Reay, on behalf of the British delegation, said: "We do not believe that the present system produces wrongs or injustices; but we should be ready, if the contrary be proved, to examine the German propositions again, while reserving the right of submitting a proposition of our own."

General Davis, of the United States, supported the German propositions in the following address:

"The delegation of the United States considers the rules relative to neutrality on land, submitted by the French delegation and adopted by this commission, as in the nature of a general declaration of principle which conforms with the rules of International Law. For this reason, and because of their excellence, it has warmly supported the rules proposed by the French delegation. . . . The position thus taken has been occupied by the government of the United States for more than a century.

"But the articles submitted by the German delegation are a little more advanced and establish a status for neutral inhabitants of belligerent territory. The status thus established seems to me to conform to the conditions of modern commerce. Commercial operations are no longer confined to a single state, but extend to several states. It is not necessary to explain to this commission the extent and importance of these relations, nor the importance of preventing their useless interruption in time of war.

"The rules which have been submitted by the German delegation embrace this point. Moreover, they define the rights, the duties, and the immunities of a neutral inhabitant of a belligerent state in time of war. They accord to him immunity from burdens of a specifically military nature, and they exempt his property from military contributions. If there occur the military necessity of confiscating or utilizing his property, he must receive a specific and generous indemnity. In all other respects his situation is not changed. His property is taxed to support the civil administration, and, if the military administration of civil affairs is more expensive than their ordinary administration, he must pay his share of the increased expense. The rules accord him exemption only from specifically military contributions.

"The delegation of the United States believes that all this is distinct progress for humanity and for the exact definition of the rules and obligations of neutrals. And for reasons just stated, it is happy to support the propositions of the delegation of Germany."

The proposed rules, twelve in number, were then taken up one by one for discussion, and four of them were finally adopted. The first one defined neutral persons

as "all the subjects [1] of a state which does not take part in the war." In defense of this definition, Baron von Bieberstein argued that the subjects of a neutral state should not be considered as hostile belligerents, no matter what may be their place of abode; and that the tie of allegiance which unites them with a neutral state creates for them a special status carrying with it rights and duties.

Lord Reay asserted, on the other hand, that a distinction should be made between the status of a neutral person as regards the belligerent in whose land he resides, and his status as regards the belligerent who invades that land.

"It would seem to us unquestionable," he said, "that usage established by International Law now forbids a government to compel a neutral resident within its territory to take up arms; but that it is permitted to treat a neutral, as far as concerns his property or lands, or the payment of taxes, in time of war, in the same manner and to the same extent as it does its own citizens.

"On the other hand, the invading power has a right to treat all inhabitants of the invaded territory on a plane of equality, and can therefore exact from neutrals the same contributions and the same services as from the citizens of the country. The neutral has no right, then, to privileged treatment, and any special position which may be granted him will be due only to the grace of the invader.

"The German proposition would result in changing this condition of things and would concede to the neutral a special position and a treatment more favorable than that accorded to the citizens of the country invaded."

The British delegation later reconsidered its opposition to this first rule, and it was adopted unanimously by both commission and conference.

The second rule provides that a neutral can not avail himself of his neutrality if he commits hostile acts against

[1] The word *nationaux* was adopted after the rejection of *ressortissants*.

a belligerent, or if he commits acts in favor of a belligerent, especially if he enlists voluntarily in the ranks of the armed force of one of the combatants. But in such case he may not be treated more harshly by the belligerent against whom he has broken his neutrality than can be the citizen of the other belligerent state who has done the same thing. And the third rule provides that "acts committed in favor of a belligerent" do not include the contribution of goods or the lending of money to one of the belligerents, unless the contributor or the lender dwells within the territory owned or occupied by the other belligerent, or unless the goods come from those territories; nor do such acts include the rendering of police or civil services.

These rules were also adopted unanimously. The proviso that a neutral who breaks his neutrality towards one of the belligerents may not be treated with exceptional severity simply because he was a neutral when he committed the hostile act, was adopted on the initiative of the Swiss delegation. And in reply to a question put by a delegate from Haiti, the conference informally indorsed the statement made by several leading delegates that the writing or publishing of articles criticising the war should not be considered a "hostile act."

The fourth rule [1] provided that the property of railways, coming from the territory of neutral powers and owned by those powers or by companies or private persons, and recognizable as such, can be requisitioned and used by a belligerent only in the case and to the extent that an imperious necessity demands; and it must be returned as soon as possible to the country of its origin. The neutral

[1] A part of this rule was adopted by the Conference of 1899, and formed Article 54 of its Code of Laws relating to Warfare on Land.

power, on its side, may, if necessary, retain and utilize, to a proper extent, the property coming from the territory of the belligerent power. A mutual indemnity must be paid, in proportion to the amount of property used and to the duration of its utilization.

The property indicated by this rule is a railroad company's rolling stock, or cars of various kinds, and the rule was adopted on the motion of M. Eyschen, of Luxemburg,[1] who argued that large countries as well as small ones, like his own, are interested in its adoption. He advanced three reasons why a distinction should be made between the treatment of this and of other kinds of neutral property: First, a country might be drained of all its rolling stock, if a belligerent were permitted to requisition freely all that came into its territory. Second, such property is destined to a public service, — to the general interests of an entire body politic; and if there be a collision in the matter between the interests of a belligerent power and those of a peaceful neutral, why should the neutral's interests yield to the belligerent's? Finally, an injury done to a private individual can be repaired by a just indemnity, but the evil produced by the confiscation of the material of public transportation is incalculable and irreparable. After pointing out in an extended and forceful address the vast importance of unrestricted railway transportation to the economic and other phases of modern life, and the justice of his proposition, M. Eyschen closed with the following appeal:

"By codifying the laws of warfare, the conference has already imposed its will on fields of battle. But around the theater of war,

[1] That part of the rule adopted in 1899 was advocated by M. Beernaert, of Belgium, and adopted then on his initiative.

many peaceful and eminently respectable interests are sacrificed to it. Certain of these interests threatened by it can be effectually protected. By strengthening the rights of neutrals, the conference will succeed in restricting the economic field and in circumscribing more narrowly the closed lists of combat. This will be one more of the most efficient means of diminishing the evils of war, and of accomplishing the mission with which the high confidence of the nations has honored us."

Although General von Gündell, of Germany, and his military colleague from Austria made speeches in reply to M. Eyschen, calling attention to the imperious necessities of generals in the field, the only part of the Luxemburg proposition rejected was the rule that at the beginning of hostilities a sufficient delay should be accorded by each belligerent to neutrals to remove railway rolling stock to their own country. The rest of the Luxemburg proposition was adopted as the fourth rule, and with it two desires (*vœux*), also proposed by M. Eyschen, and expressed as follows:

"That in case of war the competent military and civil authorities shall make it their especial duty to assure and protect the maintenance of pacific relations, especially commercial and industrial relations, between the inhabitants of the belligerent countries and neutral states.

"That the high contracting powers shall seek to establish, by treaties with each other, uniform agreements concerning the military obligations which each state shall exact of the foreigners settled on its territory."

This last desire was proposed and passed in consequence of the failure of eight propositions made by the German delegation with the object of protecting neutral residents in belligerent lands from the exaction of military services (even though "voluntarily" offered) and from unusual military contributions. The eight propositions referred

to were subjected to a long discussion, and were objected to chiefly for the reason that the rules proposed by them should be the subject of national, instead of international, legislation. In support of this reason, the differences between "emigrating and immigrating" countries, and between "colonial and non-colonial" countries, were emphasized with the object of showing that a uniform rule applied to all countries alike would not be just. The commission adopted the rules by a feeble majority; but so many reservations to them were made in the plenary session of the conference that they were referred back to the commission with the result that they were there suppressed. In their stead the second *desire* above quoted was adopted unanimously by both commission and conference.

D. THE LAWS AND CUSTOMS OF WARFARE ON LAND

The Russian programme for the first conference mentioned as its seventh topic: "The revision of the Declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels, which has remained unratified to the present day."

The Conference of Brussels met on the invitation of the Russian government, and was composed of representatives from fourteen of the chief governments of Continental Europe and from Great Britain. The spirit in which it did its work was expressed in the preamble to its declaration in the words:

"It has been asserted unanimously that the progress of civilization should have as its result the utmost possible diminution of the calami-

ties of war, and that the sole legitimate end which states should seek during the war is to weaken the enemy without inflicting useless suffering upon him. . . . War, being thus regulated [by definite laws and customs], would entail fewer calamities, and be less subject to the aggravations caused by the uncertainty, the surprises, and the passions involved in the struggle; it would lead more effectually to what should be its final aim, the restoration, namely, of a more substantial and lasting peace between the belligerent states."

The project which this conference drew up was a comprehensive one, containing twelve chapters and fifty-six articles. It did not adopt this code, but referred it to the various governments represented, "as a conscientious inquiry, of a nature to serve as the basis of a later exchange of ideas." Just a quarter of a century later, its project became the basis of the code adopted by the first Hague Conference. Its twelve chapters were reduced to ten, and its fifty-six articles were increased to sixty; while the progress in civilization and in warfare during the quarter century were reflected in the new code in various ways.

In the course of the discussion of these articles in the Conference at The Hague, M. de Martens, of Russia, took occasion to make the following interesting statement as to the origin and motives of the earlier conference:

"His Majesty, Alexander II, convinced of the great importance of formulating a code of the laws and customs of warfare in time of peace when minds and passions are not inflamed, took the initiative in convoking the Conference of Brussels in 1874. The Emperor had in mind well-known facts of history which prove that, in time of war, mutual recriminations and mutual hatred increase the inevitable atrocities of warfare. Moreover, the uncertainty of belligerents as to the laws and customs of war provokes not only hatred, but also useless cruelties committed on the field of battle.

"The initiative of my August Sovereign was not due at all to a new idea. Already, during the War of Secession, President Lincoln

intrusted to Professor Lieber the task of drawing up instructions for the armies of General Grant. These regulations were a great blessing, not only to the troops of the Northern States, but also to those of the Southern Confederates. Such were the circumstances in which the force of events themselves evolved the idea of a regulation of the laws of war. The example was given. The Declaration of Brussels, called forth by Emperor Alexander II, was its logical and natural sequence.

"The importance of this declaration consists in this: for the first time, an international agreement concerning the laws of war was to be established, really compulsory for the armies of modern states and designed to protect inoffensive, peaceable, and unarmed people from the useless cruelties of warfare and from the evils of invasion which are not required by imperious military necessities."

1. Belligerents

a. The Conference of 1899

The adoption of a code of laws for the regulation of people engaged in warfare necessitates a definition of those to whom the code shall apply. The term *belligerent* is applied to people engaged in warfare; and the Conference of Brussels defined this term to include not only soldiers in regular armies, but also militia and volunteer corps fulfilling the following conditions: 1. the possession of a leader responsible for his subordinates; 2. the possession of a regular, distinctive emblem recognizable at a distance; 3. the bearing of arms openly; 4. the conduct of warfare in accordance with its laws and customs.[1] It further provided that the population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in

[1] Article 1.

accordance with the conditions above stated, shall be regarded as belligerents, if they respect the laws and customs of war.[1] It also provided that both combatants and non-combatants may form a part of the armed forces of belligerents, and that, in case of capture by the enemy, both shall be entitled to the rights of prisoners of war.[2]

When these articles were read for discussion in the first Conference at The Hague, their adoption was opposed by M. Beernaert, of Belgium, who said that, while he recognized their object to be the humane one of reducing the evils of war and the sufferings which it entails, yet he believed them to deal with things which can not be made the subjects of international agreement, and which should be left as they were, — under the dominion of that tacit and common law which arises from the principles of the law of nations. "By attempting to restrict war to states alone," he said, "their citizens being left in some sort as simple spectators, shall we not run the risk of reducing the elements of resistance, by enervating the powerful strength of patriotism? Is not the citizen's first duty the defense of his country, and is it not to the accomplishment of this duty that we all owe the finest pages of our national history? To say to citizens that they must not mingle in struggles on which depends the fate of their country, — is that not to encourage that evil indifference which is, perhaps, one of the worst ills from which our time is suffering? Small countries, above all, need to make use of all their resources in making good their defense. . . . Will it not be better then to leave this matter to the law of nations and to that ceaseless progress of ideas which the present conference

[1] Article 2. [2] Article 3.

and the lofty initiative from which it proceeds will so powerfully stimulate?"

President de Martens immediately replied to these arguments by an address in which he first recalled the origin and purpose of the Conference of Brussels, and then continued as follows:

"It was said in 1874, and has been said again to-day, that it is preferable to leave such questions in uncertainty and in the exclusive domain of the law of nations. But is this opinion indeed a just one? This uncertainty, is it advantageous to the weak? Does the weak become stronger because the *duties* of the strong are not determined? Does the strong become stronger because his *rights* are defined and, therefore, restricted? I do not think so. I am profoundly convinced that it is above all in the interest of the weak that his rights, as well as his duties, shall be defined. It is impossible to impose upon the strongest respect for the rights of the weakest, if the duties of the latter are not recognized.

". . . But, gentlemen, the heart has reasons which the brain does not comprehend; and in time of war, there is only one rule recognized: the rule of war. I bow respectfully before the great deeds done by the human heart during warfare and on fields of battle; the Red Cross affords the best examples of them. But, gentlemen, the noble sentiments of the human heart very often and unfortunately remain a sealed book in the midst of battles.

"Our present task is to remind the nations of their duties, not only in time of peace, but still more in time of war. Our task has been well defined from the commencement of our common labors; we desire to establish, in a spirit of harmony, humanity, and justice, a uniform basis for the instructions which our governments will agree to give to their armed forces in the field.

". . . To leave an uncertainty hovering over these questions would have the fatal result of causing the interests of force to triumph over those of humanity. In drawing your kind and serious attention to these considerations, gentlemen, I have the sole desire that you shall measure aright the inevitable consequences of sacrificing the vital interests of peaceful and unarmed populations by leaving them to the

risks of war and of the law of nations. These consequences will be disastrous in the highest degree, because the Conference at The Hague will have demonstrated, a second time, in the eyes of the civilized world, the inability of governments to define the rights of warfare for the purpose of restricting its cruelties and atrocities. It is for you, gentlemen, to judge of the deplorable result which this fact will have on the public opinion of the civilized world. It is for you to answer the question: To whose advantage will be the doubt and uncertainty, — to the weak or to the strong?"

In spite of M. de Martens's powerful appeal for the adoption of the rules defining belligerents, the subcommission was not entirely reassured as to a country's entire liberty of defense, and at a later meeting General Sir John Ardagh, of Great Britain, proposed the following article in addition: "Nothing in this chapter shall be considered as tending to diminish or suppress the right which belongs to the population of an invaded country to fulfill its duty of opposing to the invaders, by every legitimate means, the most energetic patriotic resistance."

Colonel Künzli, of Switzerland, warmly supported this last article, and proposed in addition the rule that "no reprisals can be made upon the populace of an occupied territory for having taken up arms openly against the invader." He advocated these additions in an ardent speech, whose keynote was: "Do not punish the love of country; do not take harsh measures against nations who rise *en masse* in defense of their soil."

Again, M. de Martens made an effective reply. He declared that neither the Conference of Brussels nor that of The Hague had any desire or intention of setting bounds to the nations' virtue of patriotism, or contesting their right of defense. "This right is sacred," he said, "but no less sacred is the duty of the governments not to sacri-

fice useless victims to the purposes of war. . . . Heroes are not created by codes, and the only code which heroes have is their self-sacrifice, their good will, and their patriotism. . . . The rules we are considering leave the door open to the heroic sacrifices which nations will be ready to make for their defense: a heroic nation is, like heroes, beyond codes and rules and facts. . . . But our task is simply to establish by common agreement between states the rights and duties to be observed by those peoples who desire to struggle legitimately for their country, . . . to save the lives and property of the weak, the unarmed, and the inoffensive." He then read a statement which, while asserting the great desirability of defining and regulating the usages of war, admitted the present impossibility of providing for every contingency, and declared that "in the cases not included within the agreement of to-day, nations and belligerents will remain under the protection and under the sovereignty of the principles of international law, such as they flow from established custom between civilized nations, from the laws of humanity, and from the demands of the public conscience."

This statement was accepted as satisfactory by M. Beernaert, who exclaimed: "To-morrow as to-day, the rights of the conqueror, far from being infinite, will be restrained by the laws of the universal conscience, and no general will dare to infringe upon them, since that would be to place himself under the ban of civilized nations." The subcommission, also, accepted M. de Martens's statement as a satisfactory supplement to the rules, and it adopted the latter.

The British and Swiss delegates were still inclined to insist upon their proposed additions to the rules; but

when the military representatives from Germany, Russia, the Netherlands, and other countries began to argue that the rules were already too liberal in recognizing non-soldiers as soldiers, and when even the rules adopted were thus put in jeopardy, they withdrew their additions, and the long debate came to a sudden end.

The delegates from the United States took no part in this debate; but Captain Crozier says in his official report that he considered the withdrawal of the British and Swiss propositions the wise thing to do, since the rules adopted had already granted "the extreme concession to unorganized resistance" by imposing upon it solely the observance of the laws and customs of war.

The commission and conference adopted unanimously the subcommission's rules in regard to belligerents, and they took their place as Articles 1, 2, and 3, of the convention adopted, while M. de Martens's statement above referred to was made, as a commentary upon them and, indeed, upon all the rules adopted, the preamble to the entire convention.

b. The Conference of 1907

No long debate of fundamental importance, concerning the scope of the term "belligerents," occurred in the Conference of 1907. But the German delegates sought to define a little more precisely the meaning of the term, and to restrict a little more closely its use. They introduced two amendments, one providing that a *previous notice* must be given to the enemy of the "regular, distinctive emblem" worn by militia corps and volunteers; the other providing that a populace rising *en masse* to resist an in-

vader must, to be considered belligerents, not only "respect the laws and customs of war," but also *bear arms openly.*

General von Gündell, of Germany, supported the first amendment by the argument that the distinctive signs of militia corps and volunteers are difficult to recognize at a long distance, and that a previous notice of them to belligerents would help to avoid mistakes. General Amourel, of France, opposed the amendment for the reasons that militia, or at least volunteer corps, are generally organized at critical moments when to give such notice would be impracticable; that distinctive signs must be changed, especially in the course of long campaigns; that to require notice of all such changes would be excessive; and that, after all, the true distinctive sign of combatants is the bearing of arms openly, and this requirement is made by the existing rule.

The representative of Switzerland, who had just announced that his country, after eight years of hesitation, had recently signed the Convention of 1899, opposed the German amendment for the reason that it would be one more restriction on a country's right of defense.

The amendment was voted down by the subcommission by a vote of twenty-three to eleven;[1] and it was not again taken up.

The second German amendment requiring a people rising *en masse* against an invader "to bear arms openly" was supported by General von Gündell, who pointed out the grave consequences which would result, in time of war, from the carrying of concealed weapons. He recalled Colonel von Schwarzhoff's words, in regard to this matter, in the Conference of 1899:

[1] The United States delegation voted for it.

"And since we are speaking of humanity, it is time to remember that soldiers also are men, and have a right to be treated with humanity. Soldiers who, exhausted by fatigue after a long march or a battle, come to rest in a village have a right to be sure that the peaceful inhabitants shall not change suddenly into furious enemies."

There was no opposition to this amendment; but Colonel Michelson, of Russia, inquired if it would not cause the part of the population who did not take up arms to be suspected unjustly and thus subjected to the risk of reprisals. M. Beernaert, of Belgium, replied to this question that the new rule could not endanger those who bore no weapons at all, — that it was directed only against the carrying of concealed weapons.

The amendment was passed by a vote of thirty to three,[1] with two abstentions.[2] Switzerland's delegate explained that his abstention from the vote was due to a fear lest the new rule might be considered an aggravation of the present state of affairs.

The commission and conference adopted the amendment without discussion.

2. Prisoners of War

a. The Conference of 1899

No formal definition of "prisoners of war" is given in the laws and customs codified by the first conference, but this is implied by its rules in regard to belligerents. It was expressly voted, however, that individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands, and whom

[1] Chili, Cuba, Mexico. [2] Montenegro, Switzerland.

the latter thinks fit to detain, have a right to be treated as prisoners of war, provided that they are supplied with a certificate from the military authorities of the army they were accompanying (Article 13).

The treatment accorded to prisoners of war is carefully defined. They are in the power of the hostile government, but not in that of the individuals or corps who captured them; they must be humanely treated; all their personal property, except arms, horses, and military papers, remains their own (Article 4). They may be detained in a town, fortress, camp, or any other location and bound not to go beyond certain fixed limits; but they can be confined only as an indispensable measure of safety (Article 5). They must be provided for by the government into whose hands they have fallen; and, in the absence of a special treaty between the belligerents, they must be treated, as regards food, quarters, and clothing, on the same footing as the troops of the government which has captured them (Article 7). They are subject to the laws, regulations, and orders in force in the army of the state into whose hands they have fallen; and any act of insubordination justifies the adoption of such measures of severity towards them as may be necessary (Article 8, paragraphs 1 and 2). They shall enjoy untrammeled freedom in the exercise of their religion, including attendance at their own church services, on the sole condition that they comply with the regulations against disorder and escape prescribed by the military authorities (Article 18). Their wills shall be received or drawn up on the same conditions as for soldiers of the national army; and the same rule shall be applied in regard to death certificates and to burial, due consideration being given to grade and rank (Article 19).

Certain regulations, quite new and broad in their scope, were also adopted as to their employment and wages. A state may employ its prisoners of war as laborers, according to their military rank and natural aptitude; but the tasks set them shall not be excessive, and shall have nothing to do with the operations of the war. They may be authorized to work for the state itself, for private persons, or on their own account. The work they do for the state shall be paid for according to the wages in force for soldiers of the national army employed on similar tasks; the work they do for the non-military departments of the public service or for private persons shall be arranged and paid for by agreement with the military authorities. Their wages shall be used for the betterment of their condition, and the balance shall be paid them at the time of their release, after the cost of their maintenance is deducted (Article 6).

The proposition was made, but rejected, that officers taken prisoner should be permitted to retain their swords. It was provided, on the other hand, that they may be paid their full salary by their captors, if circumstances demanded, and that their own government should repay the sum (Article 17). M. Beernaert, of Belgium, proposed that this action should be taken on the mediation of a neutral power; but Colonel von Schwarzhoff, of Germany, opposed this mediation as being a probable source of international difficulties, and M. Beernaert withdrew the proposition.

The desirability of extending charitable aid and comfort to prisoners of war was recognized, and such activity was regulated by a few simple rules. Relief societies organized for the purpose of serving as the medium of

such charitable aid, and regularly constituted in accordance with the laws of their country, shall receive from belligerents, for themselves and their duly authorized agents, every facility compatible with military necessities and administrative regulations, for the effective accomplishment of their humane task. Delegates of these societies may be permitted to distribute relief within places of detention, as well as within the halting places of prisoners being sent back to their own country, if furnished with a personal permit by the military authorities, and on giving a written promise to comply with all the regulations for order and police (Article 15).

The Conference of 1899 made a notable advance beyond that of 1874 in providing for the establishment of such bureaus of information relative to prisoners of war as had been in partial operation during the wars of 1866 and 1870. Such bureau must be established, on the commencement of hostilities, in each of the belligerent states and in the neutral countries on whose territory belligerents have been received. Its duty is to reply to all inquiries about prisoners of war; and it must be supplied from all competent sources with the information necessary to enable it to keep an individual record of each prisoner of war. It must be kept informed of internments and transfers, as well as of admissions into hospitals and of deaths (Article 14, paragraph 1).

The rule that every prisoner of war, if questioned, is bound to declare his true name and rank (Article 9) was originally intended to aid in according him proper treatment; but it will be of much initial service also to the new bureau of information.

The new bureau is also charged with the collection of

all articles of personal use, all valuables, letters, etc., found on the battlefields or left by prisoners who have died in hospital or ambulance; and it must transmit such things to those to whom they belong (Article 14, paragraph 2).

The rule in regard to the punishment of prisoners who attempt to escape gave rise to considerable difference of opinion. The Brussels rule permitted prisoners in flight to be fired upon, after they had been summoned to halt; but the Hague rule does not expressly give this permission.

The Brussels rule permitted disciplinary punishment or a more strict confinement for prisoners recaptured in an attempt to escape; the Hague rule permits only disciplinary punishment in such cases (Article 8, paragraph 3). Professor Lammasch, of Austria, argued that in view of the conflict of duties which exists for a prisoner of war, he should be subjected to no punishment whatever, even disciplinary punishment, for an attempt to escape. Colonel Gilinsky, of Russia, on the other hand, argued that disciplinary punishment would not be sufficient to repress attempts to escape; that strong guards can not be spared from the army to watch prisoners of war; that with weak guards it would always be easy for skillful prisoners to escape, and if this could be done with impunity, or with slight punishment, such individuals would make a practice of getting captured and then of escaping with information for their own army. He therefore advocated the recognition of an attempt to escape as an offense, to be tried and punished by court martial. The conference took the middle ground between these two contentions, and retained disciplinary punishment, while

rejecting closer confinement and trial and punishment by court martial.

General Order No. 100 of the United States regulations provided for severe penalty, even for death, for conspiracy among prisoners of war to effect a united or general escape, or to revolt against the authority of the captors. But neither the Brussels nor the Hague rules provide expressly for such an offense, although the Hague Conference gave informal assent to the statement made by M. Rolin, of Siam, that *crimes* associated with attempts to escape, such as the assassination of guards, etc., are recognized and may be punished in accordance with the rule subjecting prisoners of war to the laws, regulations, and orders in force in the army of the state into whose power they have fallen (Article 8, paragraph 1).

The Brussels rule provided that prisoners who have succeeded in escaping and are again taken prisoner are not liable to any punishment for their previous flight. Colonel Khuepach, of Austria, said that by permitting no punishment for successful flight, and by permitting disciplinary punishment for unsuccessful flight, the rule would set a premium on cleverness. But the Hague Conference adopted the Brussels rule (Article 8, paragraph 4).

Finally, certain rules were adopted regarding the release of prisoners on parole. Prisoners of war may be set at liberty on parole if the laws of their own country authorize it, and, in such case, they are bound, on their personal honor, scrupulously to fulfill the promises they have made both to their own government and to the government by whom they were made prisoners. Their own government is bound to require or accept of them no service

incompatible with the parole given (Article 10). Any prisoner of war, who is liberated on parole and recaptured bearing arms against the government to whom he had pledged his honor, or against the allies of that government, forfeits his right to be treated as a prisoner of war, and may be brought before the courts for trial (Article 12). General Order No. 100, of the United States, prescribed the death penalty for this offense; the Hague rule, following that of Brussels, merely provides that the offender shall be subjected to trial; but here, again, the injured belligerent's laws are evidently supposed to operate.

The rules regarding prisoners of war end, appropriately, with the requirement (adopted for the first time in the Hague convention) that after the conclusion of peace, prisoners of war shall be sent back to their own country with the shortest possible delay (Article 20).

b. The Conference of 1907

The Japanese delegation proposed to define still further the term "prisoners of war," by adding to Article 13 the rule that "the subjects of a belligerent state, residing within the territory of their country's enemy, can not be confined in one place (*internés*) unless the exigencies of the war impose the necessity of such action." Count Tornielli, of Italy, supported this proposition, but demanded that the prohibition should apply to the *expulsion* of such people as well. The Japanese delegation accepted Count Tornielli's amendment, and explained that its own proposition was due to a desire to protect from adverse local laws the persons, goods, and business of subjects of a belligerent state residing within the enemy's territory;

this protection, it claimed, was shown to be necessary by certain cases which have occurred since 1899. It denied the charge that its proposition was really designed to establish, under the cloak of "imperious military necessity," the right of interning non-combatant populations, and declared that it was ready to strike out the words which admit of any exception to the rule.

The Italian delegation supported its proposition by arguing that, although obnoxious *individuals* may always be expelled from a country, a belligerent's right to expel the enemy's subjects *en masse* should be restricted to cases where "military necessity" has caused the enemy to resort to internment *en masse.*

The Japanese proposition was vigorously resisted for the reason that it was opposed to the principle of the convention of 1899, by which war is restricted to belligerents, and the civil population is protected from it in every possible way; while the Italian was resisted on the ground that it was opposed to the incontestable right of each state to expel obnoxious residents both in time of war and in time of peace.

In view of the strong opposition to the two propositions in the subcommission and its committee, they were not pressed to a vote, and both were allowed to lie on the table.

Several propositions were presented affecting the treatment of prisoners of war. The Japanese delegation proposed to include within personal property which might be taken from prisoners, not only arms, horses, and military papers (Article 4), but also "all other articles pertaining to military usages." Asked if this phrase referred to optical and measuring instruments, the Japanese representative replied that it had reference especially to maps,

bicycles, and means of transportation for military purposes. The proposition was voted upon without further discussion, and was rejected by twenty-nine votes to six.[1]

The Cuban delegation moved an amendment (to Rule 5) providing that prisoners of war can be confined only as an indispensable measure of safety, *and only for the duration of the circumstances which necessitate their confinement.* This amendment was adopted unanimously, and without discussion.

Several amendments were proposed for the regulation of the work and wages of prisoners of war. The Spanish delegation moved that *officers* be excepted from the rule that a state may employ its prisoners of war as laborers according to their military rank and natural aptitude (Article 6). The only argument advanced in favor of this exception was that "it would not be suitable to intrust to the mercy of the captor that discretion as to rank and aptitude which, under certain circumstances, might oblige an officer to perform vexatious tasks." The proposition was not opposed, and was adopted unanimously. On the motion of the German delegation, the words "according to their military rank" were retained in the rule to be applied to *under officers.* A Japanese amendment was also adopted, providing that where no system of wages is in force for soldiers of the national army, prisoners of war shall be paid according to a *rate proportioned to the tasks performed.* Another Spanish amendment provided that the cost of maintaining prisoners of war shall *not* be deducted from the wages paid to them on their release (Article 6). This was advocated on the ground that the

[1] The affirmative votes were those of the United States, Austria, Great Britain, Japan, Panama, and Roumania.

dearness of food, often very great in countries engaged in warfare, or other circumstances, might use up all the wages of the prisoners, and thus their captor alone, who is bound to support them in any case, would benefit by their labor. This amendment was opposed for the reason that its adoption might make soldiers better off, financially, when prisoners of war than when at home where a portion of their earnings must go towards their support. The amendment was rejected by a vote of twenty-three to twelve.[1]

The Japanese delegation proposed that officers made prisoners of war *may* be paid *a suitable salary* by the governments into whose hands they fall, subject to reimbursement by the officers' government (Article 17). This amendment was referred to a committee, which adopted the rule — it was believed with the Japanese military delegate's assent — that the government *shall* pay to officers who are prisoners of war within their hands *a salary equal to that paid to officers of the same rank in its own army*, subject to reimbursement by their own government. The committee's phrasing of the rule did away with the optional character of the rule of 1899, and harmonized it with the Geneva Convention's rule in regard to the pay of physicians made prisoners of war. When it was reported to the subcommission, Japan's first delegate said that his military colleague had *not* given his assent to it in the committee, and that the Japanese delegation would vote against it. The subcommission adopted it by a vote of thirty-four to one; and at a later session of the commission this vote was made unanimous by the Japanese delegation, under instructions from its government, changing its vote to the affirmative.

[1] The United States delegation voted for it.

The bureau of information, provided for in 1899, was made the subject of a Japanese and a Cuban amendment, both of which were unanimously adopted without discussion (Article 14). They charged the bureau with the additional duty of keeping a record of the prisoner's registration numbers, name and forename, age, place of residence, rank, corps, date and place of capture, confinement, parole, exchange, escape, admission to hospitals, wounds, disease, and "all other particulars," and of forwarding this record to the prisoner's own government after the conclusion of peace.

3. Means of injuring the Enemy

a. The Conference of 1899

The conference first established, without opposition or discussion, the general principle that "belligerents have not an unrestricted right of adopting means of injuring the enemy" (Article 22).

It then recognized the validity of special treaties which prohibit certain of these means, and enumerated seven upon which it placed its own prohibition. These seven are as follows: 1. The use of poison or poisoned arms; 2. The treacherous killing or wounding of individuals belonging to the hostile nation or army; 3. The killing or wounding of an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion; 4. The declaration that no quarter will be given; 5. The use of arms, projectiles, or materials of a nature to cause superfluous injury; 6. The improper use of a flag of truce, a national flag, military ensigns, or the enemy's uniform, as well as of the distinctive signs

of the Geneva Convention; 7. The destruction or seizure of the enemy's property, unless imperatively demanded by the necessities of war (Article 23).

These seven prohibitions were adopted unanimously, and with very little discussion. The Brussels rule used the word "murder" instead of "killing" in the second and third prohibitions; the Hague Conference substituted the milder word, and also added "wounding," which the Brussels rule did not include. General Order No. 100 prescribed the death penalty for killing or wounding a disabled enemy; but the Hague convention leaves penalties to the belligerent's own laws. The Hague rule in regard to quarter is more drastic than that of the United States, which permitted the declaration of "no quarter" as a retaliatory measure and in the special case where a commander believes himself in such great straits that his own salvation makes it impossible for him to encumber himself with prisoners; the Hague prohibition of the declaration of no quarter is absolute.

When the prohibition of destroying or seizing the enemy's private property, except in case of dire military necessity, was adopted, Captain Crozier, of the United States, endeavored to have this rule applied to private property on the sea as well as on land; but the subcommission decided that its duty was solely to revise the laws of warfare upon land.[1]

The Brussels rule, that "ruses of war and the use of means of procuring information about the enemy and the country are considered legitimate" (Article 24), was adopted without discussion or definition.

[1] An account of the United States delegation's more formal endeavor and its result has already been given on pages 126–133.

Siege, assault, and bombardment, as means of injuring the enemy, were carefully regulated. It was unanimously agreed to prohibit the attack or bombardment of towns, villages, dwellings, or buildings which are not defended (Article 25). General Poortugael, of the Netherlands, proposed to prohibit also the bombardment of such places by naval forces as well as by armies. Delegates from Belgium and Italy supported this proposition; and when they were reminded that the subcommission had decided, in the case of the seizure and destruction of private property, that its duty was solely to revise the laws of warfare upon land, they replied that bombardment of a town, even from the sea, pertained to land warfare, as much or more than to naval; that it is warfare within territorial waters; that even when it is from the sea its object is to affect land operations; and that when marines are disembarked they become by that fact land troops. In spite of these ingenious arguments, it was decided to consider the question as one pertaining to naval warfare and to refer it to another conference.

Before commencing a bombardment, except in the case of an assault, the commander of the attacking force is required to do all that he can to warn the authorities; he must take all necessary measures to protect, as far as possible, buildings devoted to religion, art, science, or charity, and hospitals and other places where the sick and wounded are collected; these buildings are all to be spared, provided they are not used at the time of the bombardment for military purposes, and the besieged are expected to indicate them by special signs visible and notified in advance to the besiegers (Articles 26 and 27).

The pillage of a town or place, even when taken by assault, is prohibited (Article 28).

b. The Conference of 1907

Two more means of injuring the enemy were added to the list of prohibitions adopted in 1899.

The German delegation proposed to prohibit the repudiation (as extinguished, suspended, or non-receivable) of the private claims of the subjects of hostile powers. The argument advanced in favor of this proposition was that its adoption would prevent the passage of laws in time of war which make it impossible for the subject of a hostile state to enforce the execution of a contract by resort to the courts of his country's enemy. The subcommission regarded this proposition as a fortunate expression of one of the results of the principles established in 1899, and adopted it unanimously, with the modification of the use of the words "rights and actions at law" instead of "private claims." It rejected the Russian proposal to make this prohibition conditional on the said subjects not taking part directly or indirectly in the war; its committee rejected, also, another Russian proposition to permit, under certain circumstances, a belligerent to seize an enemy's credits or claims which might be used to prolong the war.

The second prohibited means of injuring the enemy was proposed by the German delegation. The proposition was adopted and was added to Article 23 under the following form: "A belligerent is also forbidden to compel the subjects of its enemy to take part in the operations of the war directed against their country, even when they have been in the belligerent's service before the war commenced." The rule of 1899 forbade any compulsion to be exerted upon the population of an *occupied territory*

to take part in military operations against their country (Article 44); while the German amendment of 1907 extended this rule to *all* the subjects of the hostile party, whether residing in their own country, occupied by the belligerent, or residing anywhere else within the belligerent's power. The arguments advanced in support of this amendment were that soldiers retained by force within the ranks of an army can be only a source of weakness to it; and that, even if this were not true, the demands of justice and humanity made upon warfare would prevent such a measure. This principle was admitted without much discussion, and the German amendment was adopted unanimously.

But when the Austrian delegation proposed to restrict the German amendment to the provision that a belligerent should be forbidden to compel its enemy's subjects to take part *as soldiers* in the operations of the war directed against their own country, and thus made it permissible for a belligerent to exact other services from its enemy's subjects against their country, a long discussion arose. In the course of this discussion, the German amendment itself was imperiled; and, although the Austrian proposition was finally withdrawn, it caused seven delegations to withhold their vote and signature from an amendment which was afterwards adopted in regard to the services rendered to belligerents by the people of the territory occupied by them (Article 44).[1]

When the renewal of the declaration of 1899, which prohibited for a term of five years the hurling of projectiles

[1] For an account of this later amendment (Article 44) and the opposition to it (which was practically the support of the Austrian amendment to Article 23), see pages 256–259.

and explosives from balloons, came up for discussion, the Russian and Italian delegations proposed that it should be forbidden, *forever*, to bombard undefended towns, etc., either by artillery *or by the launching of projectiles or explosives from balloons*. The direful results of such bombardment were emphasized, and the injuries it would inflict upon non-combatants and neutrals, and upon useful and beautiful public buildings, were pointed out. M. Renault, of France, declared that the prohibition of the bombardment of undefended towns, etc., adopted in 1899, included bombardment from balloons and from every other source. But since no such interpretation had been passed, judicially, upon that rule, and since it had been expressly adopted as applying to warfare on the land and not to warfare on the sea, the commission insisted on amending the rule. This it did by first adopting the Russo-Italian proposition by a vote of thirty-one to one, with three abstentions;[1] and at the next session by voting unanimously to add to the prohibition of 1899 the words "bombardment *by any means whatever*."

The commission on naval warfare had already agreed to prohibit the bombardment of undefended towns, etc., by naval forces,[2] and had added to the list of buildings which must be protected in case of the bombardment of defended towns *historical monuments*. This last measure had been adopted, appropriately, on motion of the delegation from Greece; and when M. Beernaert, of Belgium, proposed its addition to the laws of warfare on land, it was adopted unanimously and without discussion.

[1] Cuba cast the one negative vote; France, Sweden, and Turkey abstained.
[2] Cf. pages 100–104.

4. Spies, Flags of Truce, Armistice, Capitulations

a. The Conference of 1899

The Brussels rules regarding *spies* were adopted almost intact. They first define a spy as follows: Only that individual can be considered a spy who, acting clandestinely or under false pretenses, obtains or seeks to obtain information in a belligerent's zone of operations, with the intention of communicating it to the hostile party. Thus, soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies; nor are soldiers or civilians who openly prosecute their mission of conveying dispatches either to their own army or that of the enemy; nor are individuals sent in balloons to deliver dispatches and to maintain communication between the various parts of an army or a territory (Article 29).

The Brussels rule defining a spy used the words "in places occupied by the enemy" instead of "in a belligerent's zone of operations." Colonel von Schwarzhoff, of Germany, proposed this change and explained that by "zone of operations" he meant the territory on which is an army either in march or in repose, and including the neighboring districts where this army exercises a certain influence by the reach of its arms, by its patrols, and by short reconnoitering expeditions. M. Beernaert, of Belgium, doubted the wisdom of thus enlarging the scope of the definition — and thus increasing the perils of spies, — but withdrew his objection, and the change was adopted.

Colonel Gilinsky, of Russia, feared that by excluding from the class of spies those civilians who openly convey

dispatches, an easy way would be opened to civilians to act as real spies while carrying dispatches as a pretext. He therefore moved to exclude from the class of spies only civilians "attached to armies" who convey dispatches, or better still to strike out the clause entirely. But the commission voted to retain the clause as a safeguard against false interpretations injurious to civilians who, in good faith, carry dispatches; for it believed that those acting on false pretenses could be detected; and these may be treated as spies.

The Brussels rule in regard to the trial and punishment of spies was as follows: "The spy taken in the act will be tried and dealt with according to the laws in force in the army which has seized him." General Mounier, of France, demanded the suppression of this rule in the Hague convention, for the reason that it is harsh treatment to condemn a spy acting, perhaps, on the orders of his superiors and in virtue of a declaration signed by his own government. This argument had weight with the conference; for it did not prescribe that a spy should be punished, but changed the rule so as to read: A spy taken in the act can not be punished without previous trial (Article 30). The conference also adopted the Brussels rule that a spy who, after rejoining the army to which he belongs, is captured by the enemy, shall be treated as a prisoner of war and shall incur no responsibility for his previous acts of espionage (Article 31).

The rights and duties of individuals bearing *flags of truce* are briefly stated. They must be authorized by one of the belligerents to enter into negotiations with the other, and must be accompanied by a white flag. They have a right to inviolability, as have also the trumpeter,

bugler, or drummer, the flag bearer, and the interpreter who may accompany him (Article 32). The commander to whom a flag of truce is sent is not obliged to receive it under all circumstances; he can take all necessary steps to prevent the envoy from profiting by his mission to procure information; and in case of abuse, he has the right to detain the messenger temporarily (Article 33). The messenger loses his right of inviolability if it is positively and undeniably proven that he has taken advantage of his privileged position to provoke or commit an act of treason (Article 34).

Thus far the Hague rules follow those of Brussels concerning the bearers of flags of truce; but another Brussels rule provided that a commander may declare in advance that he will not receive such messengers during a specified period, and that if they come to him during that period, and after his declaration had been received, they shall lose their right of inviolability. Colonel von Schwarzhoff, of Germany, proposed the suppression of this rule for the reason that circumstances may occur which make the desirability of negotiating with the enemy superior to the enemy's desire to receive no messengers; Count Nigra, of Italy, advocated the suppression of the rule for the reason that it is opposed to the spirit of international law; and General Mounier, of France, favored its suppression for the reason that the commander, according to Article 33, is not obliged, *under all circumstances*, to receive flags of truce. The rule was accordingly suppressed in the Hague convention, — with the remark made by Colonel von Schwarzhoff that Article 23 should be interpreted to mean that a commander need not receive a flag of truce ***within his outposts.***

Armistices were defined and regulated as follows: An armistice is a suspension of military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice (Article 36). An armistice may be general or local. The first suspends all military operations of the belligerent states; the second, only those between certain fractions of the belligerent armies and within a fixed radius (Article 37). An armistice must be notified officially, and in good time, to the competent authorities and the troops; and hostilities must be suspended immediately after the notification, or at a fixed date (Article 38). The contracting parties must settle, in the terms of the armistice, what communications may be held, on the theater of war, with the population and with each other (Article 39).

The Brussels rules provided that any violation of the armistice by one of the parties gives the other party the right to denounce it. Colonel von Schwarzhoff asserted that a simple denunciation of the armistice is not sufficient in all cases of its violation; for example, if the violation consists in a sudden attack upon a troop of soldiers, they would not, under the rule, have even the right of defending themselves. This is an extreme case, he admitted; but other cases demand not only the right of denouncing the armistice, but also of immediately resuming operations. M. Rolin, of Siam, opposed this addition to the rule for the reason that it is desirable now, as it was in 1874, to forbid a resumption of hostilities without previous notice; and General Zuccari, of Italy, said that the denun-

ciation of the armistice and the resumption of hostilities could not usually be performed by the same person, since the denunciation is intrusted to the commander in chief, while the resumption of hostilities would depend, in the cases referred to, upon subordinate officers. It was contended, however, that only the *right*, to be used at discretion, and not the obligation, to resume hostilities immediately, was asked for; and when Colonel von Schwarzhoff proposed to limit the exercise of this right to "cases of urgency," his proposition was accepted, and the rule adopted as follows: Any serious violation of the armistice by one of the parties gives to the other party the right to denounce it and even, in case of urgency, to resume hostilities immediately (Article 40).

The Brussels rule was adopted, without discussion, that a violation of the terms of the armistice by private individuals acting on their own initiative only confers the right of demanding the punishment of the offenders, and, if losses are sustained, an indemnity for them (Article 41).

Capitulations were regulated by one of the Brussels rules, and this one was adopted, with slight modification, in 1899. It provides that capitulations agreed on between the contracting parties should take into consideration the rules of military honor; and when once agreed upon, they must be scrupulously observed by both parties (Article 35). Objection was made to this rule on the ground that it is unnecessary and also vague, as it is very difficult, to define the idea of "military honor,"—to which, according to the Brussels rule, capitulations should not be opposed. But M. Rolin, of Siam, stated his adherence to the opinion of the delegate of France in 1874, that the rule was highly important and that

emphasis should be laid on the idea of honor. M. Zenil, of Mexico, suggested that capitulations might be required "to conform to the military honor of the conqueror's code"; but this suggestion was rejected for the reason that the conqueror may not have any code, or that statements as to honor might not be contained in it. Finally, on the suggestion of Turkhan Pacha, of Turkey, the phrase, "should take into consideration the rules of military honor," was adopted.

b. The Conference of 1907

The rules of 1899 in regard to spies, flags of truce, and armistice were not amended in 1907. The Netherlands delegation proposed the following addition to the rule regarding *capitulations:* Detachments of an army capitulated to the enemy are not obliged to surrender if they are at such a distance from it as to have retained liberty of action sufficient to continue the struggle independently of the principal corps. The weight of opinion was against this proposition as dealing with a matter which should be regulated by the terms of each capitulation, and it was withdrawn without being voted on.

5. Occupation of Hostile Territory

a. The Conference of 1899

On the threshold of the discussion of the rules regulating the occupation of a country by its invader, M. Beernaert, of Belgium, opposed the policy of laying down such rules lest, by so doing, the conference might sanction the right of conquest and organize the régime of defeat. He was

himself a member of the Conference of Brussels whose rules were taken as the basis of those adopted in 1899, and he said of its rules regulating occupation:

"The idea which inspired them was, as in the case of the other rules, a wholly humanitarian one. The endeavor was to reduce as much as possible the evils of an invasion by regulating it, or, rather, by *canalizing* it; but, to secure this end, it was desired that the vanquished should admit in advance the rights of the invader upon their territory, and that it should be in some sort forbidden to populations to mingle in the war. Hence, gentlemen, arose grave difficulties which long arrested the progress of the plenipotentiaries assembled at Brussels in 1874, and which prevented their ultimate success [that is, the adoption of their projected rules]. . . . It is not that I wish to criticise the facts. Things have always been thus and will continue to be the same, no doubt, so long as humanity will not discard warfare. But, although it is natural that the conqueror should exert his power over the vanquished in the flush of victory, I can not comprehend an international agreement giving him the right to do so. And I think that such an idea would be ill received by the parliaments which have to approve our work. . . . The country invaded submits to the law of the invader; that is a fact; it is might; but we should not legalize the exercise of this power in advance, and admit that might makes right. It is not credible that the conqueror should legislate, administrate, punish, levy taxes, with the previous consent and authorization of the conquered. All that kind of thing becomes regular only on the conclusion of peace; for then only, if a treaty confirms the conquest, will new legal rights be established.

"The interest of the country occupied, and especially that of the smaller countries, has been appealed to. Speaking, then, in the name of a small country, often trampled and cruelly trampled by invasion, we prefer to bear the ills we have than fly to those we know not of."

The commission's president, Professor de Mārtens, of Russia, who had also been a member of the Brussels Conference, replied to M. Beernaert's address by saying, in part:

"If the laws of war exist — and no one disputes that fact — it is absolutely necessary that an agreement should be made for their definition. Animated by a common desire to carry our torches into an investigation of these laws and customs of warfare, we have thus far worked together in that task, and we have been able to solve the majority of the questions submitted to us. Now, when we have arrived at the most important articles of the Declaration of Brussels, it would be a misfortune to leave in utter chaos the questions connected with the articles concerning occupation and combatants." [1]

M. Beernaert had previously expressed his opinion that only those rules should be adopted which, admitting the existence, without acknowledging the right, of the conqueror, should embody his agreement to moderate the conditions of conquest. And it was entirely in this spirit that the subcommission, after President de Martens's address, took up the work of regulating the occupation of hostile territory.

It first adopted a definition of occupied territory as follows: Territory is considered occupied when it is placed *de facto* under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and is of sufficient strength to assert itself (Article 42). Colonel von Schwarzhoff, of Germany, opposed the second paragraph of this definition on the ground that it was too restrictive and would exclude, for example, territory where a belligerent has pretty well established his authority, but where communications between his occupying corps and the rest of his forces are interrupted and where revolts may arise and temporarily succeed. "Under these circumstances," he said, "it can not be sustained that the territory is not occupied."

[1] Other portions of this impressive address are quoted on pages 217–219.

Colonel Gilinsky, of Russia, emphasized this military point of view by saying that an army considers a territory as occupied when there are present in it either the bulk of the army or some of its detachments, and when its lines of communication are assured; on this territory the occupying army leaves some troops to protect its communications as it proceeds; these troops are often so few in number that a revolt becomes possible; but the fact that such a revolt may occur can not prevent the occupation from being considered as existing *de facto*.

To these military arguments the jurists opposed their reasons for retaining the second paragraph of the definition: that it is necessary to give the definition any meaning; and that when "authority" is not of sufficient strength to sustain itself it is not "established" in the territory, and the territory is in no true sense "occupied." The colonels yielded their opinion in this matter to the jurisconsults, and the definition as stated was retained.

The treatment of occupied territory was regulated by a series of articles, which may be considered under the three heads: Treatment in general; the exaction of taxes, contributions, etc.; and the treatment of public property. Under the head of general treatment it was provided that, the power of legal authority having passed *de facto* into the hands of the occupant, the latter shall take all the steps in his power to reëstablish and insure, as far as possible, public order and safety, at the same time respecting, unless absolutely impossible, the laws in force in the country (Article 43). The adoption of this rule from the Brussels code was opposed on the general principle stated in M. Beernaert's address above quoted, and an attempt was made to preserve the country's laws unconditionally;

but the rule was voted as stated by a slender majority.[1] The subcommission rejected, by a much stronger majority, and for other reasons than M. Beernaert's general principle, the Brussels rule that the officials and employees of every kind, who accept the invader's invitation to continue their services, shall enjoy his protection and shall be dismissed or disciplined only in case they fail in the obligations accepted by them, and delivered up to justice only in case they are guilty of treason towards those obligations. This rule was first rejected by a vote of fifteen to seven; but in the next session, Captain Crozier, of the United States, said that although he had voted, provisionally, for its rejection, since it had no value for his own country, which was under no risk of invasion, he would now reconsider his vote and advocate the rule's retention. This statement led to considerable discussion for and against the retention of the rule; but this discussion was ended and the rule was unanimously rejected, as the result of a remark made by Professor Veljkovitch, of Servia, that the question had been already settled by the rule that the invader shall respect the country's laws, since respect for the laws of a country implies the retention of officials named by virtue of those laws.

The invader is forbidden to compel the population of an occupied territory to take part in military operations against their own country (Article 44). Colonel Gilinsky, of Russia, desired to make this prohibition apply only to direct participation in military operations on the field of battle; he feared the rule would prevent a belligerent from compelling an inhabitant to supply him with vehicles, horses, etc. M. Beernaert, of Belgium, advocated the rule as it

[1] The subcommission afterwards adopted this article by unanimous vote.

stands, because it forbids compulsion of both direct and indirect participation in the military operations; but he admitted that belligerents may, under the rule, compel inhabitants to submit to such measures as the requisition of their vehicles and horses. Colonel von Schwarzhoff also advocated the adoption of the rule, which, he said, concerned only populations as a whole and not individuals, and which does not deprive belligerents of the right of exacting from individuals such services as those of a guide. In view of these interpretations of the rule, Colonel Gilinsky withdrew his opposition to it.

The rule forbidding any pressure on the population of occupied territory to take an oath of allegiance to the hostile power (Article 45) was adopted unanimously, and without discussion. It was at first thought to be in conflict with the United States General Order No. 100 regarding an oath of allegiance and fidelity on the part of magistrates and other civil officers; but later this was deemed not to be the case, since the Hague rule mentions only "the population."

The honor and rights of families, the life of individuals, and private property, as well as religious convictions and freedom of worship, must be respected; and private property may not be confiscated (Article 46). Colonel von Schwarzhoff, of Germany, desired to add to this rule the qualification "as far as military necessities permit"; and stated, in behalf of this addition, that a belligerent should have the right, in compelling an individual, to threaten him with death, and that the necessities of war will not always permit respect to all religious convictions. Chevalier Descamps, of Belgium, replied that it would be opposed to the spirit of the code to introduce into its various articles

a special clause for the sake of the "necessities of war"; and that the destruction of individual rights can not be admitted as a juristic thesis, although, necessity arising, recourse must be had to it at times. Colonel von Schwarzhoff responded that he would be satisfied with the rule if that were its interpretation. The rule was then adopted without further comment on its meaning.

Article 47 states concisely that "pillage is expressly forbidden." Thus the rule forbidding pillage in captured towns (Article 28) was extended to the entire territory invaded.

The treatment of occupied territory as regards the collection of taxes and other contributions was dealt with in a series of five articles. The first of these provides that if, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the state, he shall do it, as far as possible, in accordance with the rules of assessment and distribution in force; and he shall be required in return for such collection to defray the expenses of the administration of the occupied territory on the same scale as that by which the legal government was bound (Article 48). This rule was adopted, with verbal changes, from the Brussels code, and when first proposed eleven delegations voted for it, and eleven against it, with two abstentions; after a long debate, chiefly concerning its form, it was adopted by a vote of eighteen to six, which vote was later made unanimous.

The regulation of exactions over and above the regular taxes was the subject of an animated debate. A half-dozen propositions were made regarding it, and at least three different points of view were emphasized. M. van Karnebeek, of the Netherlands, favored the exaction of provi-

sions, or contributions in kind, because "it is a military necessity to subsist one's troops"; but he opposed the exaction of money contributions, except in payment of the regular taxes, because "private property should be respected, war should not be permitted to live by war, the inhabitant of occupied territory should not be made to pay the cost of the war, and the spirit of the Conference of 1874 was opposed to the evil system, introduced about 1800, by which money contributions were exacted for the enrichment of the belligerent."

On the other hand, Colonel von Schwarzhoff, of Germany, opposed the exaction of provisions, and favored the exaction of money. He explained that in an occupied territory there are three ways of getting supplies for the occupying army. First, a community may be ordered collectively to furnish a certain number of rations, or, second, individual inhabitants may be required to deliver directly the live-stock, food, etc., which they possess. Now both of these methods, especially the second, are very distasteful to the inhabitants, are often unjust (because the poor peasant may be compelled to give up the only cow he possesses, while the wealthy townsman gives up only the little food which he may chance to have in his house at the time), and, finally, they are both inefficient. Hence, a third method of procedure has been adopted; this is to establish public markets in which the officers purchase, for cash and at higher prices than prevail at the time, the products which the inhabitants bring in for sale. This method is more humane, because the poor man receives at once the money for his produce; and it is more efficient, because the inhabitants bring in their produce willingly, and even bring in that which they have carefully stowed away. Now, to

pursue this last method, money, and much money, is needed, and it must, perforce, be exacted. Professor Lammasch, of Austria, also supported Colonel von Schwarzhoff's point of view, but for the very different reason that exactions of money, by exhausting the strength of the adversary, would aid greatly in putting an end to the war. "The dead can not be restored to life," he said, "nor can arms and legs be given back to those from whom they have been amputated; but those who have given money contributions can be compensated."

The third point of view was emphasized by the Belgian delegates, M. Beernaert and the Chevalier Descamps, who were opposed to the adoption of any rule at all regarding other exactions than the regular taxes. They recognized, as a fact, the exaction of both money and provisions from the vanquished; but they opposed a "consecration by law of that which, up to the present, has been only in the realm of fact." Especially did they condemn Professor Lammasch's argument as particularly dangerous, because it would lead to the entire destruction of commerce.

In the midst of this serious conflict of opinions and propositions, M. Bourgeois, of France, pointed out that there were two principles on which all parties were in accord: first, that of not conferring the character of *right* upon what is only a *fact, the fact of war;* and second, that of diminishing the burdens which this fact of war entails upon the population of invaded territory. He proposed, therefore, that a small committee be appointed to find some rule, embodying these two principles, which would be acceptable to all parties. His proposition was adopted, and the committee reported, unanimously, four rules which were adopted by vote of all the delegations except that of

Switzerland. Switzerland's first delegate had been a member of the committee which reported the four rules, but he explained that since the committee adjourned he had received positive instructions from his government to vote against three of the rules unless the subcommission would adopt the requirement that contributions shall be compensated for at the end of the war. The subcommission declined to do this, for the reason that such a requirement has to do with the domestic affairs of each state, and an international convention should not interfere between a state and its own subjects. The Swiss delegates, accordingly, obeyed their instructions and cast the single minority vote against the four rules, with the exception of Article 50 and the first two paragraphs of Article 52, which were voted unanimously.[1]

The four rules which had been the subject of so much discussion are as follows: If, besides the taxes mentioned in Article 48, the occupant levies other money taxes in the occupied territory, this can be done only for the needs of the army or for the administration of such territory (Article 49).

No general penalty, pecuniary or other, can be inflicted on the population on account of the acts of individuals for which it can not be regarded as collectively responsible (Article 50). No contribution shall be collected except under a written order and on the responsibility of a commander in chief. This collection shall take place, as far as possible, only in accordance with the rules of assessment and distribution in force. A receipt shall be given to every contributor for what he has delivered (Article 51).

[1] The Swiss government did not give in its adhesion to the code of laws adopted in 1899 until the time of the Conference of 1907.

Neither contributions in kind nor services can be demanded from communities or inhabitants, except for the needs of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to require the population to take part in the operations of the war against their country. These requisitions and services shall be demanded only on the authority of the commander in the locality occupied. Contributions in kind shall be paid for, as far as possible, in cash; if not so paid for, receipts shall be given for them (Article 52).

The last series of rules adopted for the regulation of the occupation of hostile territory deals with the treatment of public property. They provide that not *all* public property, but only such as is of a nature to be used for the operations of the war, may be seized by the army of occupation (Article 53, paragraph 1). The occupying government shall be regarded only as administrator and usufructuary of public buildings, real property, forests, and agricultural works belonging to the hostile state and located within the country occupied. It must protect the capital of these properties, and administer it according to the rules of trusteeship (Article 55).

The property of municipalities, that of religious, charitable, and educational institutions, and those of arts and sciences, even when state property, shall be treated as private property.[1] All seizure, destruction, or intentional damage of such institutions, historical monuments, and works of art or science, is forbidden and should be punished (Article 59). When this rule was adopted, General Mirza Riza Khan, of Persia, desired to know what was meant by "religious institutions," and if it would be con-

[1] That is, shall be respected and not confiscated; see Article 46.

sidered to include mosques; the subcommission accepted the statement made in reply, that no distinction whatever must be made between the various religions, and that the expression applies equally to mosques. The Brussels rule in regard to the seizure and damage of religious institutions, and of historical monuments, works of art, etc., merely provided that such seizure and damage "should be punished by the competent authorities." The Hague rule forbids such acts, and also requires their punishment. In this, it goes farther than the United States General Order No. 100, which permitted the removal of works of art and science, etc., for the benefit of the government of the occupying army and relegated the ultimate settlement of their ownership to the treaty of peace.

Railroad plants, telegraphs, telephones, steamers and other boats (except when governed by maritime law), as well as depots of arms and all kinds of war material, are admitted to be liable to be used by the occupying army for the operations of the war, even though they are the property of companies or private individuals; but they must be restored and compensated for on the conclusion of peace (Article 53, paragraph 2). M. Beernaert, of Belgium, opposed this rule on the ground that it was inconsistent with the inviolability of private property, which had already been admitted; and, since the Belgian constitution also protected the inviolability of private property, except in case of expropriation, it would be all the more difficult, he said, for his delegation to accept it. The subcommission, however, regarded such property, even though in private hands, as quasi-public, or as too obviously useful for military purposes to be made inviolable, and the most it would concede to the opposition was to reject the Brussels statement

that "it can not be left by the army of occupation at the disposition of the enemy." The Hague rule added to the list of such property telephones, which were not included in 1874; but the conference rejected, after the subcommission, commission, and conference itself had once added to that list, the *landing connections of submarine cables.* M. de Bille, of Denmark, had advocated this addition, for the reason that submarine cables, which unite the belligerent with other countries, should enjoy the same international protection as that accorded to telegraphs. The Danish delegate to the Brussels Conference had proposed this same addition in 1874; and on both occasions Denmark would like to have moved for the protection of submarine cables throughout their entire length, but refrained from asking for more than their protection *within the limits of the maritime territory of the state,* that is, within three marine miles from the shore. The subcommission rejected the last part of the Danish proposition, but placed the landing connections of submarine cables in the list of protected property. In a plenary session of the conference, Sir Julian Pauncefote, of Great Britain, stated that his government viewed such an addition as a trespass upon the domain of maritime affairs and as being outside the competence of the conference. M. de Bille then said that, in a spirit of conciliation, and to secure unanimity in the adoption of the code, he would withdraw his proposition, but that his government would continue its efforts to secure international protection both for the landing connections of submarine cables and for the cables themselves.

Articles 54, 57, 58, 59, and 60, of the Code of Laws of Warfare on Land, have to do with railways in occupied territory which are owned by neutrals, and with the deten-

tion of belligerents and the care of the sick and wounded in neutral countries.[1]

b. The Conference of 1907

One of the rules of 1899 forbade any compulsion of the population of an occupied territory to take part in military operations against their own country (Article 44). This prohibition was extended in 1907, on motion of the German delegation, so as to apply to belligerents everywhere and not only in occupied territory (Article 23). The German delegation proposed, therefore, that Article 44 should be suppressed as unnecessary; this suppression was agreed to, and as a substitute for the suppressed article the Netherlands delegation proposed the following rule: A belligerent is forbidden to compel the population of an occupied territory to give information concerning the army of the other belligerent or its means of defense.

General Poortugael, of the Netherlands, in advocating this rule, urged that to-day, with networks of railways and tramways and the multitude of roads and canals in every direction, an officer can easily find out where he is and recover his way, even though he be in a desert or in a mountainous country; that there are excellent topographical charts which every officer and even every sergeant of patrols can possess; that it is not necessary, therefore, as it may have been once, to compel the inhabitants of an invaded territory to act as guides; that a far better way for the belligerent to gain his end, and in the minimum of time, is to induce the inhabitants of an occupied country to join his forces voluntarily,— a thing which can not be achieved

[1] These articles are discussed on pages 204–206 and 210–212.

by forcing them to commit crimes against their own country; and that, after all, if a state has not sufficient means for making war, let it keep the peace, or make peace: it is not for a Peace Conference to facilitate warfare. General Amourel, of France, also emphasized this argument by saying that compulsory guides are often more dangerous than useful to those who employ them, especially when they are drafted from a patriotic or a fanatic population. Colonel Borel, of Switzerland, added his opinion that from the military point of view the advantage obtained from compulsory guides is little or none: "To-day, more than ever before, everything in war depends upon the sovereign and fundamental factor of the intellectual and moral strength of men; whence this consequence, that voluntary action alone produces good results."

Besides this military argument, General Poortugael and Colonel Borel advocated the Netherlands proposition for the reason that to force an inhabitant of an occupied country to reveal to the enemy anything important in regard to his fellow-countrymen would be immoral in the highest degree: "It is not for us to raise up Ephialtes! . . . Let us reflect on the fatal position of such unfortunate inhabitants. . . . On one hand, if they betray their country, they are guillotined, hung, or imprisoned for life; on the other, if they refuse to do so, they are shot." We forbid them to be forced into bearing arms against their country, added Colonel Borel, and yet it is incontestable that in guiding the enemy an individual may do his country an infinitely greater injury, and thus commit a graver crime against it, than if he fought against it in a line of riflemen or artillerists.

Baron von Gieslingen, of Austria, General Yermolow,

of Russia, and Captain Sturdza, of Roumania, vigorously opposed the Netherlands proposition and the arguments advanced in its favor. They urged the necessity of being sure of the line of march in mountainous countries, such as the Balkan Peninsula, whose passable roads are not found on any map; they insisted that offensive action is to-day, as always, the basis of success; that such action is best in the enemy's territory; that a march into that territory necessitates services from the inhabitants, not only to find the way and the enemy, but to build or repair roads and bridges, to throw up fortifications in haste, to conduct baggage and commissary trains, etc. "These necessities of war," said Colonel Sturdza, "are imperative, and commanders responsible for success would be placed in the position of choosing between the imperative duty and needs of the moment and obedience to the rather theoretical rule proposed. We know that our commanders are ready to sacrifice their lives for their country and that they risk, when it is necessary, that which is even dearer than life, — their honor and good reputation; we can not, then, paralyze, by rules inapplicable in practice, their means of action. . . . We may have confidence that these officers will themselves be able to judge how far their warlike energy should go and where pity and justice should draw the line. . . . We regard war as one of the greatest calamities which can burst upon a country, and we are coöperating with enthusiasm in the great humanitarian task to which this conference is summoned. But at the same time we should not conceal from ourselves the fact that, war having once become inevitable, the inexorable necessities of the moment impose themselves in such fashion that they often defy rules whose impracticability can be foreseen at the present moment." Baron

Gieslingen, replying to General Poortugael's last argument, said:

"When one yields to superior force, he cannot be accused of failing in a patriotic duty, and his guilt is not established by any code if his offense has been committed under the domination of an irresistible compulsion. . . . The existence and the fate of a body of troops, composed of several thousand men, seems to us to merit at least as much consideration as the conscience of a peasant under interrogation, — a conscience which will be easily tranquilized by the compulsion under which its possessor acts."

The arguments of the opposition, although urged with much ardor, did not convince either committee or subcommission, and the rule proposed by the Netherlands delegation was reported to the commission, which adopted it by a vote of twenty-three to nine, with one abstention.[1] In the plenary session of the conference, the rule was adopted by a vote of all the delegations except seven. The delegations of Austria, Montenegro, Russia, Roumania, and Bulgaria reserved their votes upon it because they had accepted Article 23 only on condition of Article 44 being entirely suppressed; the German delegation reserved its vote on it because it was too specific, and by forbidding some details of warfare it might be considered to permit other pernicious ones; the Japanese delegation reserved its vote until it should see what powers accepted it and how large a majority it secured.

General Poortugael also proposed an amendment forbidding the execution of an inhabitant of an occupied territory without a sentence passed by a council of war

[1] Germany, the United States, Austria-Hungary, Bulgaria, Great Britain, Montenegro, Portugal, Roumania, and Russia voted against it; Japan abstained.

and sanctioned by the commander in chief of the army. He advocated this amendment on the ground that it would prevent executions on the spot in the excitement of the moment, and would also afford some little guarantee against judicial errors. But when M. Beernaert, of Belgium, and General Amourel, of France, declared that the laws of 1899 already protected the lives of the inhabitants of occupied territory and forbade summary executions even for spies, General Poortugael withdrew his amendment, on the condition that the above declaration, as the cause of its withdrawal, be entered upon the records.

The Austrian delegation proposed that the respect accorded to private property (Article 46) be accorded *in principle.* It stated that it did not wish to detract from the rights of private property, but simply wanted to make Article 46 more consistent with the following articles, especially with Article 53, which deals with quasi-public property. But the commission expressed its opinion that the proposed amendment *would* detract from the rights of private property; and the delegation withdrew it.

The Conference of 1907 tried not only to preserve but to strengthen the rights of private property by adopting an amendment proposed by the Russian delegation to Article 52, which provides that the receipts given for contributions in kind shall be redeemed in money as soon as possible. Russia's representative urged that such a measure would be in the interests both of the population, who might suffer great distress if payment for their produce were long delayed, and of the occupying army itself, "which can never be profited by the exhaustion of the country it occupies." He proposed that the receipts should be redeemed even during hostilities, without waiting for the

return of peace; but this last addition was not deemed necessary to the words "as soon as possible."

An Austrian and Russian amendment to Article 53 proposed to substitute for the list of public or quasi-public property (liable to seizure by an occupying army for its military operations, on condition of restitution and indemnity) a general statement including all means of communication and transportation. This suggestion was adopted, and the rule now includes "all means, on land and sea, and in the air, of transmitting news and transporting persons or things, except those regulated by maritime law." The sweeping form of this statement was objected to on the ground that since it protects the enemy's passenger boats used for navigating rivers from capture in ports, it interferes with the right of maritime capture; but it was held that the right of maritime capture would not apply to such a case, and hence there would be no interference. It would naturally be supposed that the broad statement adopted would include the landing connections of submarine cables, which the Danish delegation of 1899 had tried so ably to have protected. But, apparently to make assurance doubly sure, the Danish delegation proposed the rule that submarine cables connecting an occupied territory with a neutral territory shall be seized or destroyed only in case of absolute necessity; and they shall be restored and an indemnity agreement made for them on the restoration of peace. When this rule was proposed, the British delegation asked for an adjournment of its discussion, so that it might have the opportunity of examining it. At a later session, Lord Reay announced that the British delegation was entirely satisfied with the proposed rule. It was then adopted unanimously, and one of

Denmark's objects was attained, but on its adoption, the statement was made and indorsed that it had to do only with land connections, and did not at all affect the seizure or destruction of submarine cables in the open sea.

This last article was numbered 54, and was put in the place of Article 54 in the 1899 code, which had to do with the property of railways entering an occupied territory from neutral states. The latter article, together with Articles 57 to 60, inclusive, were transferred to the convention of 1907 in regard to the rights and duties of neutrals. Thus the code of laws regulating warfare on the land, which comprised sixty articles in 1899, was reduced to fifty-six in 1907.

6. The Opening of Hostilities

The Conference of 1907

This topic did not form a part of the programme of the first conference; but, because of events which transpired in the course of the next few years, the Russian government placed it upon the programme for the second conference.

It was presented to the consideration of the second subcommission of the II Commission in the form of the following questions: Should the opening of hostilities be preceded by a declaration of war or an equivalent act? Should a fixed time elapse between the declaration and the opening of hostilities? Should the declaration be announced to the powers, and by whom?

In response to the above questions, the French delegation proposed an agreement between the contracting

powers that "hostilities should not commence between them without a previous and unequivocal warning which shall have the form either of a declaration stating the causes of the war, or that of an ultimatum with a conditional declaration of war."

General Yermolow and Colonel Michelson, of Russia, General Poortugael, of the Netherlands, General Amourel, of France, and Baron von Bieberstein, of Germany, supported this proposition and urged in its favor the following considerations: an international agreement on the subject is desirable because positive international law does not yet require such previous warning; a previous warning is desirable to relieve governments of the necessity of remaining fully armed and on the *qui vive* against sudden attack in time of peace; to enable them to reduce their effective armaments in time of peace, and thus to reduce the financial burden of armies and fleets; to prevent an unexpected attack upon commerce; to give expression to the modern belief that every war, before it is commenced, should be justified or explained to the family or society of nations by the statement of definite causes; and to afford an opportunity to neutral governments of offering their good offices to end the dispute, or of persuading the disputants to submit their difference to the Permanent Court of Arbitration at The Hague.

These arguments were accepted as conclusive by the subcommission, which adopted the French proposition by an affirmative vote of all the delegations save two, with two abstentions.[1] The commission and conference adopted

[1] The Brazilian and Dominican delegations voted no, for the reason, apparently, that the proposition did not fix a definite time between the warning and the blow. Cuba abstained because the proposition was regarded as

it by unanimous vote, and it was embodied in a separate treaty (Convention III).

It will be observed that the French proposition did not include a statement as to the delay which must follow "a previous warning" before hostilities are commenced. The Netherlands delegation moved to fix this delay at "not less than twenty-four hours"; and General Poortugael, in offering this amendment to the French proposition, argued that unless some such definition of "a previous warning" be adopted, the latter might be reduced to a half hour or less and become a mere form; he also showed by historic examples that even the denunciation of armistices is followed by a fixed delay before hostilities are resumed. Colonel Michelson, of Russia, supported the Netherlands amendment and urged that the proposed delay, short and insufficient though it was, should be adopted, with the hope that a longer delay may be secured in the future. But the French, German, and Japanese delegations opposed this amendment, without stating the reasons for their opposition, and when it was put to a vote the subcommission rejected it by sixteen noes, thirteen ayes, and five abstentions.[1]

The French proposition included the rule that "the state of war should be notified without delay to the neutral powers." This rule was advocated by the Netherlands, French, and Italian representatives for the reasons that

opposed to the constitutional right of the Cuban congress to declare war; and China abstained apparently because the proposition implied the necessity of the declaration of war being accepted by the power to whom it is sent, and because it did not define "war" which, as the history of China amply shows, has often been made under the guise of "expeditions."

[1] Six of the eight great powers, including the United States, voted against this amendment, Russia voted for it, and Austria-Hungary abstained.

war between two states often involves others because of treaties of alliance; that neutral merchants and navigators at a distance from their homes should be duly notified; that war often causes great annoyance to neutral countries which, having duties to perform in their relations with belligerents, have the right to be promptly informed when their duties begin.

The Belgian delegation proposed that the notification of the war to neutrals might be made by telegraph or cable, but that it should not take effect as far as they were concerned until forty-eight hours after its reception. The French and German delegations opposed this amendment for the reason that the delay might be utilized by neutrals for the commission of acts contrary to the rules of neutrality, — for the sale of war ships to the belligerents, for example.

The right of neutrals to receive prompt notification of the war was unanimously admitted by the subcommission; but the question of when this notification should go into effect was referred to a special committee[1] with power to report directly to the commission. The committee's report was reached after but little discussion and was adopted unanimously by both commission and conference. The rule as reported provides that "the state of war must be notified without delay to the neutral powers, and will go into effect as regards them only after the reception of a notification which may be made by telegraphic means; but the neutral powers can not invoke the lack of notification if it be proved conclusively that they knew in fact of the state of war."

[1] This committee was composed of eighteen members, representing fourteen countries. The United States representative on it was General G. B. Davis.

When the rule in regard to a previous declaration of war was first proposed, the United States delegation reserved its opinion upon it pending instructions from the home government. At the next meeting of the subcommission, one week later, General Porter stated that the United States Constitution gives to the Congress the exclusive power of declaring war; but that "it is with great satisfaction that this delegation declares that the proposition presented by the French delegation is not in contradiction with the law cited above and, for this reason, the delegation of the United States of America takes pleasure in adhering to it. It is proper to add, however, that although this is true as regards offensive military operations, the invariable policy of the government of the United States of America has been to invest in the President, as commander in chief of the constitutional forces on land and sea, the full power of defending the territories and the property of the United States of America in case of invasion, and of exercising the right of national defense at all times and in all places."

The convention was, accordingly, voted for and signed by the United States delegation and ratified by the Senate. The Cuban delegation, because of the same constitutional consideration as that expressed by the United States delegation, voted against the rule in the subcommission, but afterwards voted for it in the commission and conference, and signed the convention containing it.

XIII. ARBITRATION

A. GOOD OFFICES AND MEDIATION

a. THE CONFERENCE OF 1899

The last topic on the Russian programme was stated to be "the acceptance, in principle, of the use of good offices, mediation, and voluntary arbitration, in cases adapted to such means, with the object of preventing armed conflicts between nations; an agreement as to the mode of applying these means; and the adoption of a uniform practice of them." It was assigned to the III (and last) Commission; and, like many last things, it speedily became first in the minds of both conference and public.

The discussion of good offices and mediation was based on a series of articles proposed by the Russian delegation. Chevalier Descamps, of Belgium, who, in his capacity of *rapporteur* of the commission, presented a very able report on the whole subject of arbitration, stated the distinction between "good offices" and "mediation" to be that the former are considered more friendly and less definite than the latter, and are often followed by a "mediation" in which the third power, having extended its good offices, is called upon to act as mediator between the combatants. Both were justified on the ground that all civilized nations are members of one great international society, and that a war between any two members of this society may cause irretrievable injury to one or all of the others.

Before this argument, — and with the thought, doubtless, of others not expressed, — there was no opposition to the adoption of the agreement that in case of serious dispute or conflict, before an appeal is made to arms, the powers would have recourse, as far as circumstances permit, to the good offices or mediation of one or more friendly powers.

It will be noted that this agreement is qualified by the two clauses "in case of serious dispute or conflict" and "as far as circumstances permit." M. Asser, of the Netherlands, moved to strike out the latter clause, on the ground that although it was adopted in 1856 by the Treaty of Paris, it had been discarded in 1885 by the Act of Berlin; hence, to retain it in 1899 would be a step backward. Count Nigra, of Italy, supported this motion, on the ground that the clause in question would destroy, to a large extent, the utility of the agreement. The motion was adopted, in committee, and the qualifying clause was omitted. The commission restored it again, on the motion of Sir Julian Pauncefote, of Great Britain, who had voted at first for its omission, but who now moved to restore it for the reason that, the rule being a new one, its application would be facilitated by the qualifying clause. M. Bourgeois, of France, also advocated the retention of the clause, for the reason that the new rule was to be of very wide, almost universal, application, whereas the Act of Berlin of 1885 had applied only to disputes localized in Africa; and that to attempt more, at first, than the powers could carry out would be a source of weakness both to the agreement and to the powers who made it.

No attempt was made, naturally, to define the circumstances which would, or would not, "permit." Nor was

it stated what is meant by a "serious dispute or conflict"; but the *rapporteur* interpreted this, without contradiction, to mean any grave dispute which puts in danger the maintenance of peaceful relations; in other than such disputes, he said, good offices or mediation might constitute unjustifiable and dangerous meddling.

The agreement noted above was that the powers would *have recourse* to the good offices or mediation of one or more friendly powers; and this was intended to mean that the parties to the dispute would themselves request the services of another. But the further statement was made that "independently of this recourse, the signatory powers consider it useful that one or more powers, strangers to the dispute, should, on their own initiative, and as far as circumstances permit, offer their good offices or their mediation to the states at variance with each other." This right to offer good offices or mediation was based upon the independence and, in the eyes of international law, the equality of states; it was also admitted to be, in many cases, identical with the duty of a state to defend its rights and interests as a member of the "peaceful society of nations." On the motion of Count Nigra, this right was stated to belong to "powers strangers to the conflict, even during the course of hostilities."

The conference ignored the distinction sometimes made between good offices and mediation, from the point of view of friendly feelings, and regarded them both as being offered in a wholly conciliatory spirit. In order to make this entirely plain, and to give additional encouragement to the extension of good offices or mediation, the agreement further provides that "the exercise of this right shall never be considered by either of the parties to the dispute

as an unfriendly act." The word "never" was not commented upon; but the place of this proviso makes it apply, not only to such offers made before the war begins, but also to those made "even during the course of hostilities," when one of the combatants may be supposed to be gaining an advantage.

Professor Veljkovitch, of Servia, proposed to add to this last rule the statement that the *refusal* of an offer of good offices or mediation shall never be considered an unfriendly act. But this proposition was opposed for the reason that it was not desirable to insert what might seem like an invitation to refuse mediation in a convention whose object it is to encourage all possible means of preserving the peace. It was stated in the discussion, however, that such a refusal can not be considered an unfriendly act, inasmuch as the right to offer mediation implies a corresponding right to refuse it. On condition that this statement should be embodied in the minutes, Professor Veljkovich withdrew his proposition.

But, in order to prevent any unfair advantage being taken of, or derived from, the offer of mediation, the conference adopted the rule that the acceptance of mediation can not result, unless there be an agreement to the contrary, in interrupting, delaying, or hindering mobilization or other measures preparatory to war; and if its acceptance occurs after the commencement of war, it shall not, unless there be an agreement to the contrary, cause any interruption in the hostilities commenced. This rule was not proposed by the Russian delegation, but was adopted on motion of Count Nigra, who said that it might be regarded as superfluous, since mediation almost always occurs after a special agreement has been made in-

cluding all such details; or that the rule might even be inverted, and provide that "hostilities shall be delayed or suspended as a result of mediation, unless there be an agreement to the contrary." But, he continued, since there are some large powers — ready for instant warfare — which would not adopt the principle of mediation without the proviso contained in the rule, the proviso should be included in the interests of the utmost possible extension of mediation.

The rôle of the mediator is confined to the reconciliation of opposing claims and the appeasement of resentments which may have arisen between the states in dispute. The statement of this rôle would seem to be sufficiently broad to include a very large variety of acts on the part of the mediator; but, to prevent the act of mediation from being continued indefinitely, it was ruled that the functions of a mediator shall cease from the moment when it is declared, either by one of the parties to the dispute, or by the mediating power itself, that the means of reconciliation proposed are not accepted.

The dread of "intervention" on the part of the large powers or the "concert of Europe" made itself evident, at numerous times during the deliberations of the conference, in the words of the representatives of the smaller powers. To remove this fear, so far as good offices and mediation were concerned, it was provided that these, whether at the request of the parties to the dispute or upon the initiative of powers which are strangers to the dispute, have exclusively the character of advice, and never have binding force. When this rule was adopted, it was stated expressly that good offices and mediation partake not at all of the character of arbitration, of authoritative

intervention, of so-called "armed mediation," or of a hegemony imposing its will, individually or collectively, upon reluctant recipients. And to make assurance doubly sure on this point, the delegation from Servia made a formal statement to the above effect when it voted for the adoption of the rules proposed.

. A most interesting and promising development of the principle of mediation was pointed out in the committee by Mr. Holls, of the United States, and on his motion was adopted by the conference as Article 8 of the convention. This article is as follows:

"The Signatory Powers are agreed in recommending the application, when circumstances permit, of special mediation in the following manner:

"In case of a serious difference endangering the peace, the states at variance shall each choose a power, to whom they shall intrust the mission of entering into direct communication with the power chosen on the other side, with the object of preventing the rupture of peaceful relations.

"During the period of this mandate, the term of which, unless otherwise stipulated, can not exceed thirty days, the states in dispute shall discontinue all direct communication on the subject of the dispute, which shall be regarded as having been referred exclusively to the mediating powers, who shall use their best endeavors to settle the controversy.

"In case of a definite rupture of pacific relations, these powers shall remain charged with the joint duty of profiting by every opportunity to restore peace."

Mr. Holls made this important proposition in the Hague Conference entirely on his own responsibility; but it was not a new one, nor did it originate with himself, and in his book on the first Peace Conference at The Hague (pages 188–196) he has given an interesting account of the development of the idea, both in the field of international warfare

and in that of private duelling. He advocated his proposition before the committee by arguing that, "although in a case where neither arbitration nor mediation seem to be possible remedies, the chances of avoiding a conflict [by another means] may be characterized as minimal, it is none the less true that in the interests of peace and in the light of experience the attempt should be made, especially if the means proposed are of a nature to be useful even in case peace should after all be broken. . . . It is an obvious truth which has found expression in private life by the institution of seconds or witnesses, in affairs of honor between gentlemen, that on the eve of what may be a fatal encounter it is best to leave the discussion of the points in controversy to third parties rather than to the principals themselves. The second enjoys the entire confidence of his friend, whose interests he agrees to do his best in defending, until the entire affair may be settled; yet nevertheless, not being directly interested in the controversy, he preserves at all times the liberty of a mutual friend, or even of an arbitrator, but without the slightest responsibility.

"In the second place, I would respectfully submit that every institution or custom which may receive the approval of the Peace Conference, having for its object the introduction of a new element of deliberation into the relations between states when the latter have become strained, certainly marks so much progress, and may conceivably be of vital importance at a critical moment. As a matter of fact, and even with the new guarantees for peace which may be offered by the international court and the most solemn and formal declarations in favor of mediation and good offices, the negotiations between two states in con-

troversy may arrive at a point when it becomes necessary for the representative of the one to say to the representative of the other, 'One more step means war.' If the proposition which is hereby submitted to you should be adopted, it will be possible to substitute for this formula another: 'One step farther and we shall be obliged to appoint a second.' These words, it is true, will have a grave significance, and yet it would seem that they will have, besides other advantages, that of producing all the good effects of a threat of war without having the aggressive character of a menace, pure and simple, or of an ultimatum. The *amour propre* of the two parties will remain inviolate, and yet all will have been said which must be said. . . .

"Finally, and I hope this point is by no means the least important, it is recommended on account of its utility as an agency for peace even in time of war. It is not necessary to enlarge upon this idea. It is admitted that there are many circumstances where the intervention of mediatory powers with recognized authority would suffice to convince one of the belligerent states, if not both, that satisfaction has been obtained, and thus to save many lives and much suffering."

This proposition was received very favorably by the committee, and recommended to the commission for adoption, with the additional argument — made by Chevalier Descamps — that this form of "concerted mediation" has the great advantage of doing away with the necessity of an agreement, often very difficult to secure, as to the choice of one common mediator. It was also explained that the mediating seconds are left free to enter into negotiations on the subject of the controversy with

other powers, a course which may often result in simple mediation and even in arbitration. The commission and conference adopted the proposition unanimously; but Professor de Martens, of Russia, pointed out the fact that, while the first seven articles on good offices and mediation had been *agreed upon*, this article on special mediation had been *recommended*. On the demand of M. Vasconcellos, of Portugal, it was also expressly admitted that the rule in regard to the cessation of hostilities or preparation for them, as a result of mediation, should be applicable also to special mediation.

b. The Conference of 1907

The Russian programme for the Conference of 1907 mentioned first on its list, "Improvements in the rules of the Convention of 1899 regulating the Settlement of International Disputes"; but it specified among these only the Court of Arbitration and the International Commissions of Inquiry. At an early meeting of the subcommission on arbitration, however, Ambassador Choate, of the United States, offered an amendment to the statement made in 1899 that the signatory powers consider it useful that one or more powers, strangers to the dispute, should, on their own initiative, and as far as circumstances will allow, offer their good offices or mediation to the states at variance with each other. The amendment was an attempt to increase the frequency of such offers, and provided that after the word *useful* in the above article should be added the words *and desirable*. This amendment was adopted without discussion, and was the only amendment proposed to the first seven articles of 1899 which dealt with good offices and ordinary mediation.

The delegation from Haiti proposed to amend the article on special mediation by the requirement that the two seconding powers, selected respectively by the two combatants, should not act directly, but should choose "a mediator, charged with the duty of preventing the rupture of peaceful relations." It supported this amendment by the argument that special mediation would have more chance of success if, instead of being confided to two powers, it should be referred to a single state chosen under conditions which would insure complete impartiality; that if the seconding powers are themselves charged with the mediation, they would have, unconsciously perhaps, a certain tendency to consider themselves bound above all to present under the best possible aspect the cause of the states which chose them; and that not having a third power to decide between them, they would have but little chance of arriving at an agreement, while their disagreement would incur the grave risk of giving to the parties in dispute the impression that they were not at all in the wrong; a third power, on the other hand, not holding its appointment directly from the parties interested, would succeed more easily in making them listen to reason, — or, at least, its decision would seem less partial.

This amendment was referred to a subcommittee, w ich rejected it on the twofold argument, advanced by M. Asser, of the Netherlands, and Professor de Martens, of Russia: that the rule proposed in 1899 by Mr. Holls had, most unfortunately, not yet been put into practice, and hence its utility could not yet be passed upon; and that in case of acute conflict, two seconding states friendly to the disputants might possibly render to them signal services, but that little or nothing could be expected of a

third power not chosen by the disputants themselves, since, in the midst of a conflict, its voice would not be listened to. This view of the question was supported by the representatives of Germany, Italy, Austria, Great Britain, and the United States, and the committee decided to retain Article 8 intact.

B. INTERNATIONAL COMMISSIONS OF INQUIRY

a. The Conference of 1899

The introduction of International Commissions of Inquiry among the means of preserving the peace led to one of the longest and warmest debates of the conference. They were proposed by the Russian delegation, and were urged by Professor de Martens, of that delegation, who said that they were not an innovation in the law of nations; that they had already proven their efficacy, especially in disputes arising on or near international boundaries; that their utility is twofold: first, they seek out and make known the *truth* about a dispute arising suddenly and from obscure or unknown causes; and, second, they afford time for the subsidence of passions and for the transition of the acute stage of the dispute.

The Russian proposal was that the conference should bind the signatory powers to *establish* such a commission for the purpose of ascertaining and declaring the circumstances which give rise to a dissension, and of clearing up all the questions of fact by an impartial and thorough examination on the spot. The committee, in the absence of Professor de Martens, and on the advice of Professor Lammasch, of Austria, and Mr. Holls, of the United States,

decided that for the conference to agree to the establishment of such commissions would be going too far in the direction of obligatory arbitration and an infringement upon national sovereignty; it agreed, therefore, that an article should be adopted recommending to the governments concerned in the dispute to establish such commissions. At the next meeting of the committee, Professor de Martens was present,[1] and after stating the advantages of commissions of inquiry, as mentioned above, he pointed out the fact that their rôle is solely to make a *report* and not to render *decisions* in any way binding upon the parties in dispute; and that in accordance with the Russian proposal they were to act only when the dispute could not be settled by diplomatic means, and when "neither the honor nor the vital interests of the states at variance are involved." For the conference to establish these commissions, then, he argued, would not be obligatory arbitration, nor an attack upon national sovereignty; whereas, for it to confine itself to expressing a platonic desire — to *recommending* the appointment of these commissions — would result in their entire neglect.

A general discussion followed Professor de Martens's animated speech, in the course of which a compromise was agreed upon, namely, that the conference should bind the signatory powers to *establish* commissions of inquiry, *in so far as circumstances will permit.* A motion was made to omit the other qualifying clause, namely, "neither the honor nor the vital interests of the states at variance are involved." But in view of the facts that

[1] His absence had been due to the necessity of his going to Paris to act as President of the High Court of Arbitration between Great Britain and Venezuela.

some delegations had manifested much anxiety as to the commissions and their power, and that one of them had proposed to add still another qualifying clause, namely, "if the powers find it advantageous to do so," it was decided to retain the clause in regard to "honor and vital interests," as well as that in regard to "circumstances permitting."

The anxiety of various delegations in regard to the commissions of inquiry, which had become evident to the committee, had expressed itself in several arguments against them. It was said, on the one hand, that they were a long step in the direction of obligatory arbitration; on the other, that, if the report made by them on a dispute should prove unfavorable to a large power at variance with a small one, the large power would not consent to arbitration, and thus they would be an obstacle to the extension of voluntary arbitration; again, that they were only the prelude to a series of acts which would bind the powers tightly together, to the disadvantage of the smaller ones. "The delegates who fear commissions of inquiry," said Baron d'Estournelles, of France, "advance fears, and not arguments, against them, and that is why they can not be convinced. Their fears are both moral and material. They are afraid, first, of seeing the *amour propre* of their country wounded, for these commissions would reveal defects of administration, — a humiliation which they dread. Besides, they fear that as a result of these revelations they will incur the resentment of public opinion. There is, then, a kind of natural coalition between states more or less badly administered. This is the eternal struggle of darkness with daylight, and it is precisely for that reason that we shall have the utmost

difficulty in triumphing over the resistance opposed to the commissions. It is necessary to make up our minds to that fact, and to make concessions for the sake of success." The committee accepted this view of the situation; but at the instigation of its chairman, M. Bourgeois, of France, decided that it would yield only in the last extremity, and after a debate which should serve the purpose of enlightening public opinion as to the motives of both sides.

In the subcommission's debate on the committee's report, M. Beldiman, of Roumania, was the leader of the opposition to the commissions of inquiry, and in a long and earnest address stated some of the reasons for this opposition and strove to justify Roumania, Servia, and Greece for giving voice to it. After stating the desires and the needs of Roumania for peace, he opposed the proposed commissions of inquiry as a means of preserving it, for the reasons, first, that a resort to them would be practically *compulsory*, since it is not always suitable or honest to invoke on every occasion a country's "honor and vital interests," in order to prevent an inquiry into matters of grave political importance; second, that an estimate of "honor and vital interests" would vary greatly as between different states, and some would be always willing to use this qualification as a pretext for escaping investigation; third, that the three small powers referred to have gained their complete independence at the price of many hardships and sacrifices, and it would not become an international conference of the nations, some of which aided so greatly in securing that independence, to make their position less favorable than it is at present when commissions of inquiry may be resorted to or not entirely at will.

M. Veljkovitch, of Servia, added to the above arguments the statement that at the bottom of every request for an international commission of inquiry there is a kind of doubt as to the impartiality of the investigation made by the national authorities of the other state, while the acceptance of the proposal to name an international commission of inquiry implies a willingness to subject the action of its own authorities, at least in a given case, to a kind of international control. M. Veljkovitch argued also that in a dispute between a large power and a small one, the large power would not always be disposed to concede to the small power the same susceptibilities in the matter of "honor and vital interests" which it would certainly not fail to claim for itself; hence the smaller powers would sometimes be led into humiliating discussions as to whether their national honor was really concerned in any given case, while it would usually suffice for the larger powers to invoke the argument of "national honor" in order to place the smaller powers in the moral impossibility of decently provoking a discussion on the subject. The same argument held true, he asserted, — the same inequality between the larger and the smaller powers would exist as a result, — of the other qualifying clause, "as far as circumstances permit." The smaller and weaker states are sometimes compelled to submit to inequality which exists in fact, he added; "but it is absolutely impossible for us to consecrate this inequality by law and to seal it by our signatures in an international convention. . . . An institution which would only strengthen the strong as against the small and the feeble would be directly opposed, not only to the tendency of international law, but also to every idea of justice and

equity in general." The representative of Greece added no argument to the above, but stated emphatically his adhesion to them, and his opposition to the proposed commissions of inquiry. On the other hand, the representatives of two other small powers, Bulgaria and Siam, warmly advocated their adoption, in the interests of truth, of international peace, and of the smaller powers themselves.

But it was obvious that unanimity, so greatly to be desired and, indeed, so necessary in effective international agreements, could not be secured on the articles as proposed; and it was generally believed that the opposition of the three smaller powers was secretly supported by one or more of the larger powers. The skilled diplomatists of the conference, accordingly, first made an appeal for harmony and unanimity, and then made concessions. Chevalier Descamps appealed to that sincere devotion to the cause of international peace and good-fellowship which he said he believed was strong in the mind of every delegate present, and which was not at all inconsistent with the ardent love of country that had been expressed. Professor de Martens made a masterly defense of international commissions of inquiry, and then an eloquent appeal in behalf of internationalism as opposed to nationalism, humanity as opposed to selfishness, the future as opposed to the present and the past.

"Gentlemen," he said, "if in private life he is happy who sees everything rose-colored, in international life he is great who sees everything in the large. One must not remain in the lowlands when one wishes to enlarge his horizon! Why has little Holland played so great a rôle in history? Why are its ships and commerce found on every ocean? It is because the Hollanders did not remain behind

their dunes: they climbed to their tops; they breathed in the air of the open sea; they saw before them a vast horizon, and they boldly entered upon the paths which opened before them and which placed them in direct communication with all the nations of the world. This is the explanation of that spirit of universality which has always distinguished the painters, the authors, and the statesmen of this small country.

"But, gentlemen, Holland has done still more. In its struggle against the invasion of the sea, it made canals by whose means its territorial waters and those of the sea are intermingled and assimilated, just as the ideas, the institutions, and the manners of the Dutch nation have been developed, clarified, and crystallized by their international relations. May it not be said, to continue the comparison, that before the common horizon of humanity, their national ideas have been enlarged and harmonized? Let us, then, follow the example of Holland: let us climb upon our dikes, enlarge our horizon, open our canals, and prove that they were not constructed with a selfish object or in a spirit of exclusiveness. Let us tear down the barriers erected by prejudice, and then we shall see, prevailing in every discussion, a spirit of harmony and of mutual confidence. Concord, gentlemen, should be the motto and the aim of our labors!"

M. Beldiman was at first inclined to resent this appeal as too personal to himself and as a reflection on his country; but he was assured by M. Bourgeois, president of the subcommission, that it was meant solely as an appeal to all the members of the conference to rise above their own frontiers and to consider only the bounds of humanity. And when M. Bourgeois invited the delegates of Roumania, Servia, and Greece to attend the next meeting of the special committee and suggest amendments to the proposed rules, the opposition to the adoption of international commissions of inquiry under any conditions was entirely disarmed. The three members of the opposition attended the next meeting of the committee, and were met in such a cordial spirit of conciliation that two

of them, the delegates from Servia and Greece, soon reported the adhesion of their governments to the committee's revised statement. This statement was a return towards the one first adopted by the committee, namely, that "the signatory powers judge it useful that international commissions of inquiry shall be established"; and since this left their establishment purely voluntary on the part of the powers in dispute, the committee omitted the two qualifying clauses, "involving neither the honor nor the vital interests of the powers concerned," and "in so far as circumstances permit."

But Roumania still held out, and at the next meeting of the subcommission, M. Beldiman, instead of reporting his government's adhesion to the committee's new statement, presented one drafted by the Roumanian government itself. In doing this, he said that the Roumanian proposition did not differ essentially from the committee's revised statement, except that it restored the two qualifying clauses; and he hinted that the acceptance of international commissions of inquiry under any conditions was as much of a concession as his government would make.

In the interest of unanimity, and to secure *any* agreement on the vexed subject, Sir Julian Pauncefote and Count Nigra promptly moved that the Roumanian proposition be adopted; and this motion was carried by unanimous vote. Thus, international commissions of inquiry were admitted to the Convention of 1899 for the Peaceful Adjustment of International Differences, under the following conditions: In differences of an international nature involving neither honor nor essential interests, and arising from a difference of opinion on matters of fact, the signatory powers judge it useful that parties

who have not been able to come to an agreement by diplomatic negotiations should institute, as far as circumstances permit, an International Commission of Inquiry, charged with aiding in the settlement of disputes by an impartial and thorough investigation and statement of the facts (Article 9).

The rules regulating these commissions of inquiry, when once resorted to, were condensed within five articles, which caused but little discussion or opposition. They provide, first, that commissions shall be constituted by a special agreement between the parties to the controversy, which shall specify also the facts to be examined, the extent of the powers of the commissioners, and the method of procedure; if this last is not provided for in the agreement, the commission itself shall determine it.

M. Eyschen, of Luxemburg, proposed this rule in regard to the method of procedure. His first proposition was that the rules of procedure adopted for international arbitration should be applied also to international commissions of inquiry. But this proposition was rejected, for the reason that the function of commissions of inquiry, being simply to ascertain and declare facts, is very different from that of arbitration, which is to pass upon both law and fact. But M. Eyschen insisted that *some* regulation for the procedure of commissions should be given or indicated, if they were to render the services justly to be expected of them, and that this is especially true in the frequent case where the commissions would be, not jurisconsults, accustomed to technicalities of procedure, but men who happen to be on the distant scene of the dispute, and who must act quickly so as to prevent traces of the truth of the matter from being lost. The justice of these observations

was admitted, and the simple rule as to procedure stated above was adopted, together with the express proviso that the inquiry shall take place *contradictorily;* that is, each party shall be informed of all the statements made by its opponent, and both sides shall be heard in the inquiry.

The method adopted for choosing the commissioners of inquiry was the same as that adopted for the choice of arbitrators. This permits the disputants themselves to agree upon a method of selection. But, in default of such agreement, it is provided that each party shall appoint two commissioners and these shall together choose an umpire; in case of an equal division of votes, the choice of an umpire shall be intrusted to a third power, selected by the parties by common accord; if no agreement is arrived at on this point, each party shall select a different power, and the choice of an umpire shall be made by agreement between the powers thus selected. Mr. Holls proposed that instead of having only one umpire, supposedly neutral and impartial, selected by the four commissioners appointed by the two disputants, there should be three such umpires. In support of this proposition, he argued that, in case of a tie vote between the four commissioners, the deciding vote of one neutral umpire would not be so influential as would that of three, or two out of three. But the proposition was not accepted, chiefly because a commission of seven would seem rather elaborate and expensive for the settlement of many minor difficulties.

The Russian rules included one binding the parties in dispute to furnish the commission of inquiry with "all the means and all the facilities necessary for a profound

and conscientious study of the facts in the case." This was objected to on the ground that a commission might demand, innocently or with hostile intent, information relating to the security of one of the states in dispute. It was therefore stated that "the powers in dispute agree to supply the commission, to the largest extent that they consider it possible, with all the means and all the facilities necessary to a complete understanding and exact judgment of the facts in question "

It is further provided that the commission of inquiry shall present to the parties in dispute its report, signed by all the members of the commission; and that this report, limited to a statement of the facts, shall in no way have the character of an arbitral award, and shall leave to the powers in dispute entire liberty as to the action which shall follow the said statement of facts.

This last clause of the rule was purposely left indefinite so as to emphasize again the purely voluntary character of international commissions of inquiry. The clause as proposed by the Russian delegation left the powers in dispute entire liberty "either to conclude an amicable agreement based on the said report, or to agree to proceed to arbitration, or, finally, to resort to acts of force usual in mutual relations between nations." Baron d'Estournelles moved to retain only the first two alternatives and to reject the last, for the reason that it was unnecessary and unsuitable to reserve explicitly the right of war in a convention adopted by a conference of peace. Professor de Martens replied that the last alternative did not imply war, but only reprisals; but the committee adopted Baron d'Estournelles's motion. In the discussion in the subcommission, Dr. Stancioff, of Bulgaria, proposed to make

the two alternatives: "either to conclude an amicable agreement based on the said report, or to consider the report null and void." The subcommission decided, however, that there was no reason for emphasizing thus forcibly a liberty which was not at all contested; and on the suggestion of M. Odier, of Switzerland, all definite alternatives were omitted, and the rule was given its present indefinite ending.

b. The Conference of 1907

The Russian programme for 1907 specified the rules of 1899 concerning international commissions of inquiry as needing revision; and at the first meeting of the subcommission in July, 1907, amendments to them were offered by the delegations of France, Great Britain, Italy, the Netherlands, Russia, and Haiti.

Haiti's proposition, that the signatory powers should "equally suggest to the parties in dispute a recourse to international commissions of inquiry," was rejected by the committee of examination for the nominal reason that it presupposed the adoption of Haiti's amendment to Article 8, concerning special mediation; but why this reason should have been advanced, except because of the word "equally," which could have been readily discarded, is not apparent. Haiti's argument in support of its proposition was that two powers in dispute might hesitate, for highly commendable reasons, to suggest, themselves, the appointment of a commission, but would welcome the suggestion when coming from one or more disinterested third parties; moreover, Article 27 of the Convention of 1899 authorizes the signatory powers to remind powers

in dispute that the court of arbitration is open to them. Despite this reasoning, Haiti's proposition was rejected, and the real reason therefor would seem to have been a determination that commissions of inquiry should not become one whit more obligatory than they were in 1899.

The Russian and Netherlands delegations proposed that the signatory powers should "agree to establish" international commissions of inquiry, instead of merely declaring that they judged their establishment to be useful. This was a return to the rejected proposal of 1899, and at once called forth vigorous and general opposition. Professor de Martens, of Russia, urged in support of the proposition that it retained the two qualifying clauses "involving neither honor nor independence" and "if circumstances permit"; that it added no element of juristic obligation, but merely recommended emphatically the use of such commissions whenever possible; and that the rule of 1899 would positively exclude, by its phraseology, cases in which honor and essential interests were involved, whereas his proposition would *permit*, though not *require*, such cases to be settled by the commissions. M. de Beaufort, of the Netherlands, supported the Russian view of the question, and desired that the rule should be so phrased as to favor the use of commissions in every possible case, without, however, making them compulsory.

The opposition to the Russian proposal was very emphatic. Sir Edward Fry, of Great Britain, insisted that it would give an obligatory character to them under certain conditions, and that only by preserving their purely voluntary character could their usefulness be increased or even retained; he also said that the case of the Hull fishermen, in 1905, proved that the rule as at present stated

does not prevent a resort to international commissions of inquiry for cases of grave import and even for those which affect national honor and essential interests. Baron von Bieberstein, of Germany, opposed the Russian proposition for the reason that its adoption would *seem* to give an obligatory character to the commissions, since the Conference of 1899 had rejected the same proposition because it desired to emphasize their purely voluntary character; and that it would in fact, from the juristic point of view, create a *juris vinculum*, that is, a formal engagement which would be binding in all cases where honor and independence are not involved and where circumstances permit. M. Beldiman, of Roumania, the champion of absolute freedom in 1899, again asserted, very briefly, but emphatically, his opposition to any rule even seemingly obligatory. Delegates from Turkey, Greece, Austria, and Servia voiced their opposition to any appearance of obligation. M. Ruy Barbosa, of Brazil, objected to the Russian proposition's substitution of the qualifying clause, "involving neither honor nor independence," for "involving neither honor nor essential interests"; and he, too, insisted upon the retention of the purely voluntary character of the commissions.

After this almost universal opposition in the subcommission, the Netherlands delegation withdrew its proposition in the committee of examination; but Professor de Martens made another attempt to secure the adoption of the Russian proposition. He insisted that the present wording of the rule can paralyze all action on the part of mediating powers which may judge it useful for international commissions of inquiry to be resorted to by conflicting states. But the fears of the smaller powers, as

manifested in 1899 and again in the recent subcommission's debate, were recalled, and the large powers, too, were a unit in opposing the Russian amendment. Admitting the impossibility of securing his first amendment's adoption, Professor de Martens next moved to add to the commissions' duty of "aiding in the settlement of disputes by an impartial and thorough investigation and statement of the facts," the further duty of "fixing, if necessary, the responsibility for the facts." He explained that he did not desire to identify commissions of inquiry with courts of arbitration, but merely to have the commissions state the responsibility which was logically evolved from an impartial statement of the facts in the case. But here, again, he met with the emphatic opposition of the representatives of five of the great powers, and the Russian amendments to Article 9 were withdrawn.

The only amendment which the committee would accept for the much disputed Article 9 was to add to the phrase "the signatory powers judge it useful" the words "*and desirable*," — that international commissions of inquiry should be resorted to. These two words ("and desirable") had been adopted unanimously, as we have seen, as an addition to the rule regarding good offices and mediation (Article 3), and it was agreed that they should be added wherever in the convention occur the words "judge it useful."

The other amendments to the articles on international commissions of inquiry had nothing to do with questions of principle, but only with practical arrangements. Amendments were offered to each of the other five original articles (Nos. 10 to 14), and twenty-two new articles were adopted for the purpose of supplying a ready-made code of pro-

cedure which commissions might make use of, and which might facilitate both the work of commissions and the resort to them.

The French and British propositions were so much alike that they were combined in one project, which was made the basis of discussion and revision. Professor de Martens, and M. Fusinato, of Italy, criticised the Franco-British amendments as being too numerous, — an entire code of procedure, in contrast to the two or three rules adopted in 1899; they argued, too, that so many rules would endanger a commission's report being declared null and void because of the infraction of one of them. But the committee accepted Sir Edward Fry's view that experience, in the case of the Hull fishermen before the Commission of Paris, had shown the necessity of all the rules proposed, and the loss of precious time at a critical period in drawing them up and agreeing upon them; that these rules were not to be imposed upon commissions of inquiry, but merely recommended to them. Moreover, added M. Bourgeois, of France, the infraction of one of the rules made by a treaty instituting a commission of inquiry could quite as readily be made a pretext for nullifying the commission's report as could the infraction of one proposed by the conference.

The few rules of procedure adopted in 1899 were only slightly modified. The former method of appointment of commissioners was retained; but to it was added the rule that the umpire shall preside over the commission, or, when the commission does not include an umpire, it shall appoint its own presiding officer.

To the former statement that the powers in dispute agree to supply the commission, as fully as they may consider

it possible, with all means and facilities necessary to a complete understanding and exact judgment of the facts in question, the further statement was added that the powers in dispute agree to use the means at their disposal, in accordance with their domestic legislation, to procure the appearance of witnesses or experts living upon their territory and cited before the commission, and that, if such witnesses and experts can not appear before the commission, the powers will have them examined before the competent authorities. This agreement gives no authority in regard to the compulsion of witnesses and experts to the commission, but leaves it all to the powers on whose territory they may be living (*se trouvant*); but, on the other hand, whatever be their nationality, and although they be merely temporary residents or exiles on the territory of one of the powers, that power is not only authorized, but is held to be morally and juristically bound, to provide for their appearance and testimony.

One of the rules of 1899 provided that the international commission should present to the powers in dispute its report, signed by all the members of the commission. This rule was revised so as to provide that the report shall be adopted by majority vote, and signed by all the members of the commission; if one of the members refuses to sign, the fact will be mentioned, but the majority's report will be considered valid.

The Russian delegation proposed, and the United States delegation supported, the revision of the rule of 1899 which provided that the commission's report, limited to a statement of the facts, shall in no way have the character of an arbitral award, but shall leave the powers in dispute entire liberty as to the action which shall follow the said

statement of fact. The proposed revision provided that the powers in dispute, having taken cognizance of the statement of facts and responsibilities issued by the commission, are free either to conclude an amicable arrangement, or to resort to the Permanent Court of Arbitration at The Hague. This proposition was opposed by the committee of examination for the reason that it would leave arbitration as the only alternative to an amicable settlement of the dispute, and this semi-compulsory feature, it was feared, would prevent a frequent resort to commissions of inquiry.

The twenty-two new rules adopted by the conference met with very little opposition or discussion. One of these, that the questioning of witnesses shall be conducted by the president of the commission, or, for supplementary information, by its members, met with the suggestion from Sir Edward Fry, and Dr. Scott, of the United States, that the Anglo-Saxon system of direct questioning of witnesses by the agents of the parties to the dispute should be substituted for it. But the committee decided that an Anglo-Saxon would be but little embarrassed by being questioned by the president of a commission, while a French, Austrian, or German witness might be very much disconcerted by having to reply to questions put directly by an advocate, since the system of "cross-examination" was foreign to continental usage. The agents are permitted, however, to request the president to ask the questions they desire.

One of the new rules which gave rise to some discussion provides that the sessions of the commission shall not be public and the minutes and documents shall not be published, unless so decided by the commission with the con-

sent of the parties in dispute. This non-publicity was justified for the reason that witnesses might sometimes be annoyed as a result of publicity, and that it would be always easier for a commission to decide upon public sessions, if so desired, than to make its sessions secret.

Among the new rules adopted with no, or but little, discussion may be noted the following: The designation of The Hague as the place of meeting for all international commissions of inquiry, unless some other place is agreed upon by treaty between the parties in dispute; the designation of the International Bureau of the Permanent Court of Arbitration as the secretariat for all commissions which meet at The Hague, and as the depositary of the archives after the inquiry is ended; and the permission to commissions to remove temporarily to those places where more information may be secured, and to apply directly to neutral powers for permission to come upon their territory if necessary.

The articles reported by the committee and subcommission to the commission and conference were adopted unanimously and without discussion. But on their adoption by the commission, M. Beldiman said that on the eve of a wider debate upon the principle of obligation in the matter of international arbitration, it seemed to him "*desirable*" to complete, by a simple statement of facts, the history of the article which introduced among agencies for peace international commissions of inquiry (Article 9). He then recalled the famous debate of 1899 and Roumania's part in it, and said:

"The report addressed to their government by the delegates of the French Republic, whom we are happy to see with us to-day also, contained an echo of the lively debate which preceded the adoption of this

article, and, according to the text published in the 'yellow book,' this report explains the attitude taken in the matter by Greece, Roumania, and Servia in these words: 'They (that is to say, the delegates of those states) plead in fact the cause of bad government.' . . . It is proper to state simply for the sake of historic truth that the attitude taken in 1899, in this question of principle, by Greece, Roumania, and Servia, could have been interpreted at that time as having its source rather in the special conditions which exist in our Eastern countries.

"To-day this principle has been unanimously admitted, and it has not even been seriously discussed by the present conference. From the first, the propositions of France and Great Britain relative to international commissions of inquiry have retained, without a single modification, the text of Article 9, just as it was voted in 1899. The delegation of Russia has come to its support, and it has been stated that there is complete unanimity on the purely voluntary character which has been retained for this international institution. It is proper, then, to assert that, as far as this matter is concerned, it can not be said that there has been progress during the last eight years in the principle of obligation."

M. de Martens, in reply to this speech, reaffirmed the unanimity of the conference on the purely voluntary character of international commissions of inquiry, but said that this very fact made even plainer the defective phraseology of Article 9. "The powers are sovereign," he declared, "and their right of having recourse to these commissions is not subject to a single limitation. But Article 9 is formulated in such a way as to seem to forbid recourse to these commissions in cases where honor and essential interests are involved. . . . Is this phraseology really true? Does it reflect accurately the condition of affairs before the Commission of Paris on the incident at Hull, in which the 'essential interests,' if not 'the honor,' of two great powers were involved? The conference has profited by the experience of the Commission of Paris

only to elaborate a code of procedure which, in my opinion, is really too detailed; but, on the other hand, it seems to have desired to ignore the most remarkable historic lesson which is taught by this celebrated case: for, in spite of the Inquest of Hull, it has not been willing to declare 'useful and desirable' the recourse to international commissions of inquiry *in every occurrence.*" In conclusion, he said that he had no proposition to make at that late date in the conference's labors; that he merely desired to express once more his point of view, which he believed to conform to the teachings of history.

C. OBLIGATORY ARBITRATION

1. Arbitration in General

a. The Conference of 1899

The Russian Emperor's rescript of August, 1898, contained the oft-quoted words:

"The maintenance of general peace, and the possible reduction of the excessive armaments which weigh upon all nations, present themselves, in the existing condition of the world, as the ideal towards which the endeavors of all governments should be directed. . . . In the course of the last twenty years the longings for a general peace have become especially pronounced in the consciences of civilized nations. The preservation of peace has become the object of international politics; in its name, great states have made powerful alliances; for the better guarantee of peace, they have developed, in proportions hitherto unprecedented, their military forces, and still continue to increase them without shrinking from any sacrifice. All these efforts, however, have not yet been able to bring about the beneficent results of the desired pacification."

The Czar therefore proposed the meeting of an international conference, which, he said, "should be, by the help of God, a happy presage for the century which is about to commence," and which should have, as one of its prime objects, the discussion of mediation and voluntary arbitration as means of preventing armed conflicts between nations.

M. Staal, of Russia, president of the first conference, asserted in his opening address that the prevention of conflicts by generalizing, by codifying, the practice of arbitration and mediation was the very essence of the conference's task. "Diplomacy," he said, "long ago admitted, among the means of preserving peace, a resort to arbitration and mediation; but it has not defined the conditions of their employment, nor determined the cases to which they are applicable. It is to this high task that we are about to devote our efforts, sustained by the conviction that we are laboring for the welfare of all mankind and in the path marked out for us by preceding generations."

At the first meeting of the Arbitration Commission, the Russian delegation presented a series of eighteen articles, six of which were to regulate good offices and mediation, five were to be applied to international commissions of inquiry, and seven were to provide for the scope of arbitration and for arbitral procedure.[1] In presenting these articles and an explanatory note attached to them, the delegation pointed out the difference in scope between voluntary and obligatory arbitration. Voluntary arbitration, it said, is applicable to every kind of international dispute whatsoever, for it is resorted to only

[1] The *court* of arbitration was proposed later, as we shall see, by the British delegation.

after an agreement between the parties in dispute to submit the case in question to this method of settlement. Obligatory arbitration, on the other hand, does not depend upon the special consent of the parties concerned. Hence it goes without saying that obligatory arbitration can not be applied to all cases and to all kinds of disputes. There is no government which would consent to accept in advance the obligation of submitting to the decision of a tribunal of arbitration every difference arising within the international domain, if it affected the national honor of the state, its superior interests, and its imprescriptible welfare. At present, the mutual rights and duties of states are determined, to a noteworthy extent, by the sum of what are called "political treaties," which are nothing else than the temporary expression of casual and transitory relations between diverse national forces. . . . The conflicts which arise within the field of political treaties are connected, in the majority of cases, not so much with a difference of interpretation of such or such law, as with amendments to it or with its complete abrogation. The powers which take an active part in the political life of Europe can not, then, submit conflicts arising within the field of political treaties to examination by a tribunal of arbitration in whose eyes the law established by treaty would be quite as obligatory, quite as inviolable, as a law established by legislation would be in the eyes of any national tribunal. From the point of view of practical politics, then, the impossibility of universal obligatory arbitration would appear to be evident. But from another point of view, it is beyond doubt that international differences often arise, to whose solution arbitration can be always and absolutely applied; these are differences which

concern exclusively special points of law, and which touch neither the vital interests nor the national honor of states. It can not but be hoped that the Peace Conference will prescribe arbitration as the permanent and obligatory means of settlement for this latter class of differences.

This Russian point of view was shared by the conference as a whole; universal obligatory arbitration was considered utterly impossible under existing conditions, and no delegation so much as proposed it. On the other hand, the conference, almost unanimously, shared the desire to relegate certain classes of disputes to the invariable solution of arbitration; but the twofold question, as to which classes of disputes these should be, and as to the obligatory character of the arbitration, proved to be one of much difficulty and diversity of opinion.

The esteem in which the conference held arbitration as a solution of international differences was evident on numerous occasions and in several articles adopted by it.

Chevalier Descamps, of Belgium, said in his report on arbitration, which was adopted unanimously, that arbitration belongs *par excellence* to the organic institutions of juristic peace between nations. "It has proved its value," says the report; "it has increased more and more in international usage. It has all the sympathies of the present; it has the richest promises for the future. The time seems to have come for giving it, together with a broader scope and a firmer organization, the place in international law assigned it by the progress of international relations and the juristic conscience of civilized peoples. . . . Arbitral justice does not have in international law the character which it has in national law. In the latter, it would seem like a kind of derogation from the public organization

of justice; in international law, it supplies the place of all jurisdiction and it tends directly to prevent a recourse to force. Arbitral justice is not a thoughtless abdication, but on the contrary an enlightened use, of the sovereignty of states. It presents itself to us as the procedure most consistent with reason, humanity, and the true interests of the parties in dispute. . . . The farther law progresses and penetrates within the society of nations, the more arbitration is shown to be united to the structure of that society. A solution, at once pacific and juristic, of international differences, it presents itself to us as the proper instrument for assuring the right of each while safeguarding the dignity of all."

The preamble of the Convention for the peaceful Adjustment of International Differences, which was also adopted unanimously, emphasizes the opinion of the conference as to the value of arbitration, in the following phrases:

"Animated by a strong desire to coöperate for the maintenance of general peace; Resolved to advance by their best efforts the friendly settlement of international disputes; Recognizing the solidarity which unites the members of the society of civilized nations; Desirous of extending the empire of law and of strengthening the sentiment of international justice; Convinced that the permanent institution of a court of arbitration in the midst of independent powers and accessible to all of them can contribute effectively to this result; Having regard for the advantages attending the general and regular organization of arbitral procedure. . . ."

Several of the articles of the convention were of a general character and, instead of laying down specific rules, emphasized the desirability of arbitration.

The first article, which has in view good offices and medi-

ation as well as arbitration, states that, with a view to preventing as far as possible recourse to force in relations between states, the signatory powers agree to put forth all their efforts to insure the pacific settlement of international differences.

Articles 15 to 18, which, together with Article 19,[1] form the introductory chapter ("On Arbitral Justice") to the subject of international arbitration proper, state both the desirability and the voluntary character of the arbitration agreed upon. The object of international arbitration is declared to be the settlement of controversies between states by judges of their own choice and upon the basis of respect for law (Article 15). The signatory powers recognize arbitration, in questions of a judicial character, and especially in questions regarding the interpretation or application of international treaties, to be the most efficacious and at the same time the most equitable method of deciding controversies which have not been settled by diplomatic means (Article 16).

When this last article was reported to the commission, M. Beldiman, of Roumania, made the following declaration: "The Royal Government of Roumania, acquiescing entirely in the principle of *voluntary* arbitration, whose whole importance in international relations it appreciates, does not understand, however, from this article an engagement to accept arbitration in all the cases anticipated by it; it can vote for this article, therefore, only under this reserve." With this exception, the article was agreed to unanimously; for it was recognized that the sovereignty of each state was left unimpaired by it, since each state would retain the right of deciding whether or not any given

[1] Article 19 is discussed under Specific Cases of Arbitration, pages 330–331

case was of a judicial character, or was connected with the interpretation or application of treaties; and such cases they were all, except Roumania, entirely willing to submit to arbitration.

Article 16, it must be noted, has to do with cases of a judicial character or connected with treaties; that is, questions of law or those based on documents, which questions can alone be decided by judges properly so called. General arbitration, or arbitration of differences as to political, territorial, or commercial interests, was not agreed to by the powers collectively; but they adopted the statement that an agreement of arbitration may relate to every kind of controversy or solely to controversies of a particular character, and may be made with reference to disputes already existing or to those which may thereafter arise (Article 17). Baron de Bildt, of Sweden and Norway, thought this article superfluous, and asked, "Why inscribe a law which all the world has already?" Chevalier Descamps, Count Nigra, of Italy, and Professor Lammasch, of Austria, answered the question by saying that it was desirable to call attention to the great number of treaties of arbitration which had already been concluded, to give the indorsement of the conference to them, and to encourage the nations to push on farther and faster in the good work of concluding more of them.[1]

A treaty of arbitration may obviously apply to differences of the past, present, or future, as the parties making the treaty may determine. This fact was recognized by the

[1] Chevalier Descamps prepared at the request of the III Commission a summary statement of the large number of arbitration agreements which had been entered into between the various governments represented at the conference; this statement was printed and distributed to the members, and is published with the records of the conference.

above article; but at the time of its adoption, M. Beldiman stated that his government would accept the article only under the reserve that it did not apply to any differences or disputes which had arisen "before the conclusion of the present convention."

The statement that a treaty of arbitration implies the obligation of submitting in good faith to the decision of the arbitral tribunal (Article 18), was also objected to for the reason that it was superfluous; but it was defended and adopted on the express ground that it emphasized the characteristic feature of arbitration, which is not that of an attempt at conciliation, but the mutual submission of states to judges of their own choice, with the natural consequence that a repudiation of the arbitral award is no more admissible than is the violation of contracts. In regard to this article, also, M. Beldiman made the reservation that his government accepted it only on the understanding that it implied no agreement in the nature of obligatory arbitration.

One other article, of noteworthy character and interest, was adopted by the conference for the purpose of promoting the utmost possible resort to arbitration. This was a statement that "the signatory powers consider it their duty, in case a serious dispute threatens to break out between two or more of them, to remind the latter that the Permanent Court of Arbitration [1] is open to them. Hence they declare that the act of reminding the parties in dispute of the provisions of the present Convention, and the advice given to them, in the higher interests of peace, to have recourse to the permanent court, can only be considered as an exercise of good offices" (Article 27).

[1] See page 370.

The French delegation presented this proposition, and M. Bourgeois and Baron d'Estournelles, of that delegation, urged in its favor that sometimes a point of honor causes each party to the dispute to hesitate to suggest arbitration to its opponent; and that public opinion is easily led to consider such a suggestion as an act of weakness rather than as an evidence of confidence in its own good cause and of moderation founded on a spirit of justice; hence each party waits for the other to take the initiative. Several delegations supported this proposition, but the practical question arose as to the agency which should act as intermediary between the powers in general and the powers in dispute. M. Bourgeois suggested, in reply, the international bureau or the diplomatic council [1] established at The Hague in connection with the Permanent Court of Arbitration; but Professor de Martens, of Russia, objected that the bureau would not possess sufficient moral authority, while the diplomatic council would be bound by the instructions of each of its members, and hence could not act with sufficient independence. Baron d'Estournelles then proposed that the secretary-general of the international bureau should act as the agent of the powers, and on the express demand of one or more powers, in calling the disputants' attention to the Permanent Court of Arbitration. With the powers behind him, it was urged, the secretary-general would have sufficient moral authority, while his modest character of an agent could give no affront to the disputants. To this suggestion it was objected that the secretary-general might intervene with his invitation at an unfortunate moment and thus aggravate the dispute, and that especially he might thus

[1] See pages 375–378.

cause the permanent court itself to fall into disrepute. Baron d'Estournelles's proposition was put to vote in the committee and rejected by a vote of five to three, with two abstentions.

But, on the other hand, the committee was unanimous in its desire that in *some* way the powers should encourage disputants to have recourse to the Permanent Court of Arbitration. The proposition was made that the secretary-general might appeal to one or more neutral powers to extend the invitation to arbitrate; and also that the judges of the permanent court, scattered as they are among all the nations, should appeal to their respective governments to act. These propositions did not meet with favor, however, and the committee at last adopted unanimously the statement that it is the *duty* of the powers to suggest arbitration to disputants, leaving the powers themselves to find the best practical method of making the suggestion.

When this article was presented to the commission, M. Beldiman repeated his statement that his government would subscribe to absolutely nothing but *voluntary* arbitration, and suggested that the words "consider it their duty" be replaced by "judge it useful." This suggestion caused Baron d'Estournelles to make a vigorous defense of the use of the word *duty* and to assert positively that the article was preëminently to the advantage of the smaller and weaker states. But Professor Veljkovitch, of Servia, insisted that it was "a kind of invitation for the larger powers to initiate measures injurious to the justifiable *amour propre* and dignity of the smaller states, while the latter would never be permitted, in practice, to fulfill the duty stated by the article in regard to the

former. The surest method of establishing the asserted equality, he said, would have been to adopt the principle of obligatory arbitration. This caused Professor Zorn, of Germany, to assert that although there was undoubtedly in the committee of examination a powerful current in favor of obligatory arbitration, the German government would not have been in a position to adopt it. The reason for his government's objection to it he stated to be as follows:

"It is true that there exists quite a series of particular cases of arbitration, and that arbitration is no longer a thing unknown. But the experiments which have been made within the field of arbitration, up to the present time, are not of a kind sufficient to permit my government to agree to obligatory arbitration in the future. To proceed in this important matter without sufficient experience, would seem to be dangerous and might lead to discord rather than to harmony. . . . On the other hand, the German government has been impressed with the belief, held in common by all the governments represented here, that every endeavor tending to preserve peace and good relations between nations deserves most earnest attention. Hence my government has made no objections, up to the present moment, to Article 27, although, perhaps, the expression of duty would appear to go a little too far. But there would seem to be no insurmountable difficulties to this *moral* duty being expressed and emphasized. . . . The object of our task is to create a solid basis for the widest possible use of peaceful means in putting an end to international differences."

M. Odier, of Switzerland, appealed to his colleagues from the other smaller states to accept the article as not only advantageous to the smaller states, but also as a proper recognition of the attitude of neutrals towards belligerents. "We have sought," he said, "to open a new era in international relations. Until the present day, the condition of war has been left to the decision of nations

in dispute, and neutral powers have not done all they could to prevent it. Now, it must be recognized that corresponding to this new era there are new duties. *Neutrals have these duties to fulfill.* They may no longer content themselves with maintaining a more or less disapproving silence; they may no longer permit two powers to appeal to arms without putting forth their best efforts to prevent such a calamity. One of our colleagues has tried to characterize the rôle of neutrals in such a contingency, and he has invented for it the happy word 'peace-managing' (*pacigérant*). This characterization will be consecrated by the Conference of The Hague. That is why I approve heartily of the proposition presented by the French delegation, which I regard as the consecration of a duty of neutral states."

Mr. Holls, of the United States, added his approval of the article and an appeal for its unanimous adoption; but still the Servian and other Balkan delegates were obdurate, until M. Bourgeois, president of the commission, addressed to them a powerful and conciliatory appeal. "Since the opening of this conference," he said, "we have more than once succeeded in reaching a unanimous agreement on questions which, at first, seemed to divide us. It would be an important achievement, and one whose moral significance is, to my mind, beyond expression, if on this Article 27, which is one of the essential factors in our plan of arbitration, we could succeed in giving to the world the spectacle of our unanimity. . . . The disputes indicated by Article 27 are indeed only those which imperil peace; it is indeed for them alone that we consider legitimate a friendly summons to arbitration made by the signatory powers to powers in dispute. . . .

The moral utility of this article lies wholly in the fact that by it the common duty of maintaining peace among men is recognized and affirmed by the nations. Think you that it is a thing of small importance that in this conference — that is to say, not in a gathering of theorists and philosophers, discussing without restrictions and on their own personal responsibility, but in an assembly where the governments of nearly all the civilized nations of the earth are officially represented — that here, the existence of this international duty has been proclaimed, and that the idea of this duty, implanted from this time forth within the consciences of the peoples, is imposed upon the future acts of governments and nations? . . . I will repeat the words of Count Nigra: 'There are here neither large nor small powers; all are equal before the work to be accomplished.' But if this work should prove more useful to some than to others, is it not to the weakest that it will certainly bring more benefit? As I said yesterday to our colleagues of the minority in the committee of examination: Every time a court has been established in the world, and a deliberate and impartial decision has been thereby enabled to rise above the struggle of interests and passions, is it not one more guarantee to the weak against the abuse of power? Gentlemen, it will be the same between nations as it is now between men. International institutions like this will be the guarantee of the weak against the strong. In conflicts of brute force, where soldiers of muscle and steel are arrayed, there are the large and the small, the weak and the strong; when into the two scales of the balance *swords* are thrown, one may be heavier and the other lighter. But when *rights* are weighed in them, inequality ceases, and the rights of the smallest and the

weakest press down upon the scales of the balance with a weight as great as do those of the largest and strongest. It is this conviction which has guided our work, and it is of the weak, above all, that we have thought in pursuing it. May they understand our thought and respond to our hope by allying themselves with this endeavor to bring the future of Humanity more and more under the control of Law!"

In the prolonged applause which followed M. Bourgeois's peroration, the objections of the Balkan delegates faded away, and the article was adopted unanimously. It was this article in particular, however, which called forth an important declaration from the delegation of the United States. Mr. Holls, of that delegation, had supported the article both in the committee and in the commission, where he had said that the omission of Article 27 would have been fatal to the convention, for without this article it would incur the probability of never being put into practice and of remaining wholly illusory; it was necessary, he thought, to express this idea of the *moral duty* of states. "This idea, this simple word," he continued, "will inaugurate a new era, in which the peoples will recognize their bonds of solidarity and the imperious obligation of interesting themselves not only in their own peace, but in that of their neighbors. On the other hand, this article does not imply an obligation in the *juristic* sense of the word, but an obligation of a *moral* kind. . . . As for me, I rejoice that such an idea has been formulated, for I consider it the crown of our whole work."

But the American delegation's cordial support of this article, and of the convention as a whole, did not cause them to lose sight of the traditional policy of the

United States which is expressed in the Monroe Doctrine and its later developments. Accordingly, when the convention on arbitration was adopted in plenary session of the conference, the delegation presented the following declaration:

"Nothing contained in this Convention shall be so construed as to require the United States of America to depart from its traditional policy of not entering upon, interfering with, or entangling itself in the political questions or internal administration of any foreign state, nor shall anything contained in the said Convention be so construed as to require the relinquishment, by the United States of America, of its traditional attitude toward purely American questions."

b. The Conference of 1907

The subject of obligatory arbitration was brought before the Conference of 1907 in the introductory address of M. Bourgeois, of France, president of the I Commission. He referred to the long discussion of the subject in 1899; to the treaties between Denmark and Italy, Denmark and Holland, and Chili and Argentina, providing for obligatory arbitration without restriction; to the numerous treaties between various powers providing for the obligatory arbitration of certain classes of cases; and to the prophecy of Professor Zorn, of Germany, in 1899, that the opportune moment would arrive when, after experiments between pairs of states, there could be enumerated cases of arbitration obligatory for all. In conclusion, he asked if that opportune moment had now arrived, and if it would not be of considerable moral significance to consolidate by a general agreement the treaties already concluded separately between various nations and

to consecrate by a common signature the agreements already signed by most of the governments in pairs.

The question was then referred to the first subcommission, which devoted five of its sessions to a general discussion of it. In the course of this discussion, the representatives of seventeen powers expressed their governments' attitude towards a general treaty of obligatory arbitration. Thirteen of these were "smaller powers," and every one of them advocated a general treaty for the obligatory arbitration of certain classes of cases; four of them were "large powers," and two of these favored a general treaty for the obligatory arbitration of certain classes of cases, one favored such a treaty "in theory," but reserved its decision on the treaty actually proposed, and the fourth opposed a general treaty while advocating heartily the making of obligatory arbitration treaties between separate states.

Baron Marschall von Bieberstein, of Germany, was the spokesman of this last-named power, and his speech was noteworthy for several reasons. It was the first and only one, in the preliminary discussion, which frankly opposed a general treaty of obligatory arbitration even for a very restricted number of cases; and yet its opposition was based on an advocacy of the extension of obligatory arbitration itself.

"At the first Peace Conference," said the Baron, "the German delegate declared in the name of his government that experience in the field of arbitration was not of a kind to permit an agreement at that time in favor of obligatory arbitration. Eight years have passed since that declaration, and experience in the field of arbitration has accumulated to a considerable extent. The question has been, on the other hand, the subject of profound and continuous study on the

part of the German government. In view of the fruits of this examination, and under the influence of the fortunate results flowing from arbitration, my government is favorable to-day, in principle, to the idea of obligatory arbitration. It has confirmed the sincerity of this opinion by signing two treaties of permanent arbitration, one with the British government, the other with that of the United States of America, both of which include all judicial questions or those relative to the interpretation of treaties. We have, besides, inserted in our commercial treaties concluded within recent years an arbitrational agreement for a series of questions, and we have the firm intention of continuing to pursue the task in which we are engaged in concluding these treaties.

"In the course of our debates, the fortunate fact has been mentioned that a long series of other treaties of obligatory arbitration have been concluded between various states. This is genuine progress, and the credit of it is due, incontestably, to the first Peace Conference.

"It would be an error, however, to believe that a general arbitrational agreement concluded between two states can serve purely and simply as a model or, so to speak, a formulary for a world treaty. The matter is very different in the two cases. Between two states which conclude a treaty of general obligatory arbitration, the field of possible differences is more or less under the eyes of the treaty makers; it is circumscribed by a series of concrete and familiar factors, such as the geographical situation of the two countries, their financial and economic relations, and the historic traditions which have grown up between them. In a treaty including all the countries of the world, these concrete factors are wanting, and hence, even in the restricted list of juristic questions, the possibility of differences of every kind is illimitable. It follows from this that a general arbitrational agreement which, between two states, defines with sufficient clearness the rights and duties which flow from it, might be in a world treaty too vague and elastic, and hence inapplicable.

"Now, if we raise before the world the flag of obligatory arbitration, we must surely have an arbitrational agreement which would do honor to this flag and define clearly and precisely the character of the obligation. Without that we should expose ourselves to the reproach of making promises which can not be kept and of offering a formula

instead of a fact. Further, there would be danger that instead of smoothing away a difficulty, there would be added to it an additional quarrel as to the interpretation and application of the treaty itself. . . . As to universal obligatory arbitration, it is not sufficient for its successful application to assert the principle; it is necessary to arrange practical details. To use a metaphor: it is not sufficient to build a cosmopolitan dwelling, with a fine façade; it is necessary to furnish it in such a manner that the nations of the earth may live in it comfortably and on good understanding."

Austria's representative, M. de Merey, stated his government's belief in the *principle* of the obligatory arbitration of certain classes of difficulties, even under a general treaty, but said that he would reserve his decision until he knew precisely what classes would be included within the treaty proposed.

Sir Edward Fry, of Great Britain, alluded to the various treaties of general arbitration which his government had made, and stated its belief that the time had come to take one step farther in the path which leads to the conclusion of a general agreement for the settlement by means of arbitration of every question admitting of such a solution.

"I foresee," he continued, "that we shall be told that any agreement which we may be able to reach can have only an insignificant result, since the legal bond (*vinculum juris*) which it will create, will be, from the juristic point of view, feeble and indefinite. But nations are not governed solely by juristic conceptions, nor united with each other only by legal bonds. For my part, I believe that the treaty which we are considering will have a great importance in history as being the collective expression of the conscience of the civilized world."

Ambassador Choate, of the United States, was the first representative of the larger powers to speak, and his speech was a powerful argument and appeal for a general treaty

providing for the obligatory arbitration of certain classes of disputes. After alluding to the work of the first conference, and to the court of arbitration established by it as "one of the greatest advances that have yet been made in the cause of civilization and peace," Mr. Choate continued:

"But, Mr. President, great events have happened since the close of the first Peace Conference which have attracted the attention of the world and convinced it of the necessity of taking another long step forward and of making arbitration as far as human ingenuity can do it a substitute for war in all possible cases. Two terrible wars have taken place, each productive of an incalculable amount of human suffering and misery, and these wars have been followed by a steady increase of armaments, which offer a convincing proof that the evils and mischiefs which the Russian Emperor and Count Mouravieff deplored [in 1898] are still threatening the peoples of all the countries, and that arbitration is the only loophole of escape from all those evils and mischiefs. So thoroughly have all the nations, great and small, been convinced of this proposition that many of them have made haste to interchange with other individual nations agreements to settle the very questions for which arbitration was recognized by the last conference as the most efficacious and equitable remedy, by that peaceful method instead of by a resort to war. I believe that some thirty treaties have been thus exchanged among the nations of Europe alone, all substantially to the same purport and effect.

"In 1904 the United States of America, beholding from a distance the disastrous effects of those terrible conflicts of arms from which they were happily removed, proposed to ten of the leading nations to interchange treaties with them of the same nature and effect. Their proposition was most cordially welcomed and ten treaties were accordingly negotiated and exchanged, but failed of ratification by an internal domestic question which arose between the different branches of the treaty-making powers of the United States. But all parties were of one mind that all the questions for which arbitration had been recommended by the former conference should be settled by that method rather than by resort to arms, and that The

Hague Court should be the tribunal to which they should be submitted.

"In 1901, at the Second International Conference of the American States held in Mexico, to which the United States was a party, an obligatory convention was entered into and signed by all the parties taking part in the conference, by which they agreed to submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens and which can not be amicably adjusted through diplomatic channels, when said claims are of sufficient importance to warrant the expenses of arbitration, and that The Hague Tribunal should be the court for the trial and disposition of all such controversies unless otherwise specially agreed. And in case, for any cause whatever, the Permanent Court of The Hague should not be open to one or more of the high contracting parties, they obligated themselves to stipulate in a special treaty the rules under which the tribunal shall be established for taking cognizance of the questions to be submitted. This convention was for five years and was ratified by eight of the parties, including the United States of America.

"Later still, at the Third International Conference of the American States held at Rio in 1906, for the holding of which this meeting of the second Conference at The Hague was by the courtesy of the signatory parties postponed until the present year, the Mexican treaty was renewed for a further period of five years by all the parties that had ratified it and by all the other countries in the conference, and is now being ratified by them one after the other.

"At the Rio conference the subject of a still further extension of obligatory arbitration was again considered, and at that time all the parties to that conference had been invited to take part in this second Conference at The Hague. And in view of that fact, and of a general desire on their part to defer to the judgment of this present conference, the committee to whom the matter was referred, reported a resolution to ratify adherence to the principles of arbitration and, to the end that so high a purpose may be rendered practicable, to recommend to the nations represented that instructions be given their delegates to the second conference to be held at The Hague to endeavor to secure by the said assemblage of world-wide character the negotiation of a general arbitration convention so effective and definite that, meriting

the approval of the civilized world, it shall be accepted and put in force by every nation. The conference unanimously ratified the report of the committee, and the United States was a party to the ratification.

"It is under these circumstances that the delegation of the United States of America comes here instructed by its government to advocate the adoption of a general treaty of arbitration substantially of the tenor and effect of the treaties which it entered into in 1904, to which I have already referred and which became abortive by the circumstances already mentioned.

". . . There seems to be no intelligent reason why nations, having at stake grave interests from which may arise possible differences with other nations, and who have already separately agreed to submit such differences to arbitration before The Hague Tribunal, should not all together agree to exactly the same thing, and why other nations should not follow them in the paths of peace so happily inaugurated. . . . We believe that it [the American plan] will satisfy a world-wide demand for such a general treaty, and will go far to promote the cause of arbitration which all the nations are every year expecting more and more confidently as a substitute for the terrible arbitrament of war."

This address of Ambassador Choate, excellent in itself and coming after the representatives of eight of the smaller powers had advocated obligatory arbitration of a more or less restricted kind, and before any of the larger powers had expressed themselves upon it, made a great and favorable impression. Among the noteworthy addresses made by representatives of the smaller powers may be mentioned those of the Marquis de Soveral, of Portugal, M. Milovanovitch, of Servia, M. Castro, of Uruguay, and Samad Khan, of Persia. Marquis de Soveral asserted his belief that the "opportune moment" had arrived for consecrating at The Hague a state of things which since 1899 has more and more distinguished international relations. "The simple fact of the convocation of this conference by

our governments," he said, "means that they believe that the moment has arrived for giving a new impulse to the cause of peace. We bear this responsibility before the world; I am sure, gentlemen, that we shall honor it." "Without lulling ourselves by the illusive belief that in the present state of mankind," said M. Milovanovitch, "it would be possible either to abolish all the causes of warfare or even to foresee and provide for the causes of future wars, nothing prevents us from defining the causes which can and ought to be submitted to a peaceful solution. This will undoubtedly aid in making wars less frequent; and it will develop the sentiment of justice in dealings between nations and inspire a greater trust in the principles and rules of international law. Then only, when differences arise, will the states, the small states above all, be able to say: 'There are judges at The Hague!'" M. Castro referred to cynics, outside of the conference, who would probably remark that, with one or two praiseworthy exceptions, the partisans of obligatory arbitration are found only among the small states, whence they would conclude that the tendency of these same states would be quite the reverse if might were on their side. "Perhaps so," he continued, "since it accords with the imperfections of human nature, — which we are summoned to aid in correcting; but what can not be doubted is that the *presumptio juris* of seeking the rule of justice is an aid to the least strong, since in their conflicts with the powerful they can count only on right and justice." Samad Khan, in the flowery language of the Orient, said that "the new treaty of international arbitration should be the loveliest wreath of flowers which, in leaving this hospitable land, we can offer to the nations who have

sent us here. . . . Though we may not attain this time our sacred goal [of assuring general peace], we should at least strive ardently for it and desire it with all our heart: Seek, and thou shalt find! . . . The day must come when we can exclude from our vocabularies the historic motto: If you desire peace, prepare for war."

At the end of the long general discussion, the many propositions concerning arbitration were referred to a committee of examination. The committee examined them one by one, commencing with that which gave the largest scope to obligatory arbitration and ending with that which was most restrictive.

The Dominican Republic was the only state which actually proposed universal obligatory arbitration "without restriction," although Denmark "called the attention" of the conference to its three treaties, made with the Netherlands, Italy, and Portugal, which provide for obligatory arbitration without reserve. The Dominican delegation based its proposition on the desire for arbitration expressed by the representatives of nineteen American powers at the Conference of Rio Janeiro. But the committee decided unanimously that it was useless to discuss a proposition which was certain to be rejected by the conference.

The proposition which *appeared* to be of widest scope next to the Dominican was Brazil's, which provided for the arbitration of all questions which can not be settled by diplomacy, good offices, or mediation, *except* those which affect independence, territorial integrity, essential interests, domestic laws or institutions, or the interests of third parties. M. Ruy Barbosa, of Brazil, defended all of these exceptions as necessary or desirable; but they were objected to by several delegates for the reason

that, since in accordance with the proposition they were to be interpreted solely by the parties to the disputes, they would leave absolutely nothing of obligatory arbitration except the name. Professor de Martens, of Russia, opposed the proposition for the reason that it would have excluded the majority of the questions which were the object of fifty-five arbitral awards during the Nineteenth Century. Dr. Drago, of Argentina, remarked that it would be more practical to enumerate the cases of obligatory arbitration possible or desirable, instead of making vague and sweeping exceptions to a general rule; and the committee accepted this view of the matter and turned to a consideration of propositions suggesting specific classes of cases.

The preamble and articles of 1899 which had to do with arbitration and obligatory arbitration in general were all retained, in 1907, in their form as first adopted, with only one important modification. This modification was an addition to Article 27, and was proposed by M. Candamo, of Peru, in the following words:

"Article 27 declares that the signatory powers consider it their duty to remind parties in dispute that the Permanent Court is open to them. This article provides a means of setting arbitration in motion. It was one of the successes of the first conference, and it marked the triumph of a great juristic idea. But why can we not take one step farther? Why should one of the parties in dispute wait to be reminded that the affair could be submitted to arbitration? And if it be disposed to have recourse of itself to this means of peaceful solution, why should it not voluntarily come before the organization in The Hague which represents the signatory powers?

"Although it is often difficult for one power to make towards another one with whom it is in dispute an advance which might be considered an act of weakness, or as indicating a lack of confidence in

its own good cause, it would not be the same with a declaration made before the bureau officially charged by the powers to secure the functioning of the Permanent Court's and all other arbitral jurisdiction. Such a declaration would imply neither weakness nor condescension; on the contrary, it would constitute an assurance, on the part of the power from whom it emanated, of the good basis of its contention.

"The International Bureau of The Hague would in this way be made more active and more efficacious. Though it would not be charged, as M. Bourgeois and the Baron d'Estournelles desired in 1899, with taking the initiative, it would at least act in pursuance of the declaration received, and would bring it to the attention of the adverse party. This would be another means of serving as a medium between the two parties and of aiding in their reconciliation, — to the great advantage of the cause of international peace and justice."

When the Peruvian proposition came up for consideration at a subsequent meeting of the subcommission, M. Candamo advocated it in another address, in which he pointed out the fact that the large number of disputes affecting essential interests, independence, or honor, and not being subject to obligatory arbitration, might be settled by voluntary arbitration if the latter could be promoted in the way proposed.

"There is absolutely no reason," he said, "why differences, however great they may be, may not find their settlement in arbitration; and it would be in contradiction to the very object of this conference to appear to admit that there may be cases where arbitration would be inadmissible. It is proper to extend, as far as it can be done, the means of facilitating the spontaneous and voluntary recourse to arbitration, to stimulate and encourage pacific regulations. Arbitration must *always* be possible; arbitration should *always* take the place of war."

M. Gana, of Chili, cordially supported the Peruvian proposition, with the amendments, first, that no account of the dispute and its causes should be given to the Inter-

national Bureau, but that the latter should act merely as an agent for transmitting the offer and the response, and for informing all the signatory powers of the offer, so that they might perform the duty stated in the article; and, further, that the new rule should apply only to differences arising after the date of its adoption.

Baron d'Estournelles, of France, after referring to the history of Article 27 in 1899, said:

"Unfortunately, this rule has hitherto remained almost a dead letter. The propositions before us may permit us to perfect it by supplying the parties themselves with the means of appealing to arbitration, without being stopped by the point of honor, and by inviting them, so to speak, *in advance*, to address themselves, when occasion arises, to the International Bureau of The Hague. A simple declaration will suffice to show that one of the parties, having confidence in its good cause, is ready to submit to justice. This declaration, being no more than purely and simply the execution of a treaty, will require not the least sacrifice of *amour propre;* public opinion can not consider it an inadmissible humiliation."

Ambassador Choate also warmly advocated Peru's proposition, with Chili's amendments, saying that while he agreed with Baron d'Estournelles that the rule of 1899 had not rendered the important services which were rightfully expected of it, its efficacy and its very considerable importance had been put to the proof in America.

"No one, doubtless, has forgotten how a happy application of its principle has succeeded several times in preventing wars which threatened to break out between several South American states, or in shortening such wars. The opportunity afforded by this article to third parties has a great importance; but the proposed addition to it is perhaps still more important. It offers, in effect, to the parties in dispute themselves an easy means — the only practicable one, perhaps — of having recourse to arbitration, at very embarrassing times. We know how difficult, and sometimes how dangerous, it is for a

government when it is forced more or less in spite of itself into the clash of arms, to make concessions, in the face of public opinion, even though only seeming concessions, to its adversary; and we know how prudently it must take the initiative in a recourse to arbitration which is often very ill received. At such times hesitation may prove fatal and everything be lost. But according to the very simple system which has just been explained the task will be notably facilitated. The system proposed by Peru and Chili opens a new door to conciliation; it means a decided progress, and is indeed a great benefit to mankind. The United States delegation gives its warm and hearty support to the authors of the proposition."

Sir Edward Fry, Professor de Martens, and M. Ruy Barbosa also supported the proposition, and it was referred to the committee of examination for report to the commission.

The committee reported, by a vote of thirteen to four, with two abstentions,[1] an addition to Article 27, as follows: "In case of dispute between two powers, one of them may always address to the International Bureau at The Hague a note containing its declaration that it will be disposed to submit the difference to arbitration. The International Bureau will immediately bring the declaration to the knowledge of the other power." M. Candamo objected to the Chilian amendment applying the rule only to disputes arising after its adoption, and the committee rejected the amendment, but for the reason that it was unnecessary, since the arbitration would be entirely voluntary, and also for the reason that no convention can have retroactive effect, unless expressly so stipulated. On this last ground, the Chilian delegation expressed its adherence to the article as reported to the commission.

[1] Germany, Austria, Belgium, and Sweden voted against it; Greece and Switzerland abstained.

But M. Tsudzuki, of Japan, opposed the addition to the article for the reason that "the intervention of a third power in a dispute between two states is not at all calculated to lessen the tension of their relations." M. von Merey also opposed it, with the statement: "In 1899 the delegation of Austria-Hungary accepted Article 27 without conviction.' It never surrendered itself to the optimism of some other delegations in regard to this article. I assert that in the eight years which have passed since the conclusion of the convention of 1899 this article has never been put into practice. We all know that occasions for it have not been lacking. There have been controversies, differences, and even great wars between states, and never, a single time, has the article been applied. The reason is very simple. Every power thinks twice before putting its finger between the anvil and the hammer. Now, if I am consoled for the existence of this article by the fact that it has not been applied, I find it none the less inopportune to develop it by adding the Peruvian amendment. The latter seems to me, moreover, sufficiently serious and dangerous, for it would create for one or other of the parties in dispute a temptation to grant [*sic: octroyer*] to the other recourse to arbitration." M. von Merey then asserted that the simpler and better way of securing arbitration would be by the usual diplomatic negotiations, and concluded by saying:

"For one of the powers to choose a means so far-fetched as the agency of the International Bureau at The Hague would be, in my opinion, to put a pistol to the breast of the other and coerce it. I believe that such a manner of proceeding would not aid in improving the relations between states, nor render recourse to arbitration more desired or more frequent."

Baron d'Estournelles replied immediately to M. von Merey as follows: "Permit me, my dear colleague, to respond with a few words in the name of those who proposed Article 27 eight years ago. I am one of those who advocate it in its new form, but without deluding myself in the way suggested by M. von Merey. I never expected a miracle of it, above all in so short a time. What my colleagues of Peru and Chili have desired is that our labors shall not result solely in a convention on paper, but that this convention shall become a reality. After having made it a *duty* to remind states in dispute that the court at The Hague is open to them, it is desired to give to the latter a practical means of having recourse to it. M. von Merey has very justly remarked that up to the present 'not a single power has ventured between the anvil and hammer.' Precisely, we wished to do away with the anvil and hammer!" After pointing out the superiority of the proposed plan to the usual diplomatic negotiations in periods of tension, Baron d'Estournelles concluded by saying: "Instead of obliging the parties in dispute to extend each other their hands, which is very difficult, we say to them: 'Simply address yourself to the neutral Bureau at The Hague, which is . . . the international letter box.' It is in this view of the question that none of us — if he *really* desires the progress of arbitration — can refuse to vote the proposition of Peru." This reply was greeted with much applause, and the commission adopted the article as proposed, by a vote of thirty-four to seven, with three abstentions.[1]

In the plenary session of the conference, this article was

[1] The negative vote was cast by Germany, Austria, Belgium, Japan, Roumania, Sweden, and Turkey; Greece, Luxemburg, and Montenegro abstained.

adopted without dissenting voice, except for those of Japan and Turkey. Dr. Hill, of the United States, made the same declaration in regard to it as had been made by the United States delegation in 1899.[1]

2. Specific Cases

a. The Conference of 1899

The proposals in regard to arbitration submitted to the conference by the Russian delegation included five articles dealing with the obligatory arbitration of certain specified classes of cases. These articles were accompanied by an explanatory note, in which it was stated that "the recognition of obligatory arbitration, were it only within the narrowest limits, would assert the principles of law in international relations and would guarantee them against infractions and attacks; it would *neutralize*, as it were, vast domains of international law. Obligatory arbitration would be a convenient means of eliminating the misunderstandings between states which are so numerous and so troublesome, even though not very serious, and which sometimes embarrass most unnecessarily diplomatic relations. Thanks to obligatory arbitration, states could more readily enforce their legitimate claims, and, what is still more important, free themselves from unjustifiable demands.

"Obligatory arbitration would serve the cause of universal peace to an incalculable extent. Of course, the questions of secondary rank, to which alone it is applicable, constitute very rarely a cause of war. Neverthe-

[1] See page 311.

less, frequent disputes between states, even though due to questions of minor importance, and not acting as a direct menace to the maintenance of peace, alter friendly relations between them and create an atmosphere of distrust and hostility in which a war may be more readily provoked by some incident or chance spark. Obligatory arbitration, having the result of absolving the interested states from all responsibility in regard to the solution of the question between them, should aid in the preservation of their friendly relations and thus facilitate the peaceful solution of the most serious differences which can arise on the plane of their highest interests.

"In recognizing thus the high importance of obligatory arbitration, it is indispensable above all to define precisely the sphere of its application; it is necessary to indicate in what cases obligatory arbitration is applicable."

The delegation accordingly proposed as its first rule on the subject that "the contracting powers agree to have recourse to arbitration in questions pertaining to the classes mentioned below, in so far as they concern neither the vital interests nor the national honor of the parties in dispute." It proposed, secondly, that each state shall remain the sole judge of the question whether such or such a case should be submitted to arbitration, — with the exception of those cases, enumerated in the next article, which the signatory powers agree to submit to obligatory arbitration. The next article enumerated a list of cases to be submitted to obligatory arbitration; and the next two articles were united and adopted as Article 19, which will soon be referred to again.

The third article (Article 10 in the list of Russian propositions), enumerating as it did the classes of cases to be

submitted to obligatory arbitration, was the backbone of the system, and around it centered the debate in the committee of examination. It enumerated, first, disputes or claims relating to pecuniary damages incurred by a state or its citizens as the result of the illegal actions or the negligence of another state or its citizens.[1] The second class of disputes enumerated were those relating to the interpretation or application of treaties having to do with the following subjects: postal and telegraph systems, railways, the protection of submarine cables, means of preventing collisions of ships on the high seas, the navigation of international rivers and interoceanic canals, the protection of literary and artistic copyrights and of commercial patents, trade-marks, and titles, monetary and metrical systems, sanitary and veterinary rules and regulations in regard to phylloxera, inheritance, extradition and mutual judicial assistance, and boundaries (in so far as these last relate to purely technical and non-political questions).

Chevalier Descamps, of Belgium, proposed to add commercial and consular treaties to the above list; but Professors de Martens, of Russia, and Zorn, of Germany, opposed this for the reason that an arbitration clause could be inserted in all such treaties, — a measure, said Count Nigra, of Italy, which the Italian government has already decided to adopt. Count Nigra also proposed the addition of treaties relating to the free, reciprocal aid of the sick and indigent, which was adopted. M. Asser, of the Netherlands, proposed the addition of treaties relating to the aid of the sick and wounded in time of war;

[1] This class of cases will be considered under "The Forcible Collection of Debts," pages 349–350.

but Professor Zorn opposed this addition for the reason that it would result in dangers and insurmountable difficulties, and would subject even military operations to obligatory arbitration; and after considerable debate this proposition was rejected. One other addition to the list was suggested, and adopted, namely, treaties providing for rules concerning epizoöty and for prophylactic measures against phylloxera and other scourges of agriculture.

The list now included eleven classes of treaties; but Mr. Holls, of the United States, demanded the exclusion of those relating to international rivers and interoceanic canals, and to monetary systems. He said that his government would regard the navigation of such rivers as the St. Lawrence, Rio Grande, or Columbia, and the control of the Isthmian Canal, as preëminently American questions, and would not consent to their arbitration by a court composed mostly of Europeans; while the mere classing of monetary with metrical systems would affront a great American political party, whose leading men look upon the fixing of a monetary standard as a most important function of a sovereign state, and who would undoubtedly defeat the ratification of the proposed agreement in the United States Senate. This danger of non-ratification by the United States was reluctantly admitted by the committee, and the treaties referred to were stricken from the list, while the others were approved unanimously on the first reading, but subject to the proviso that they be taken up later for final settlement after instructions had been received in regard to them by the various delegations.

The second reading of the list of treaties was taken up four weeks later, on the fourth of July, and Professor Zorn immediately proposed the suppression of the entire

article containing them. He said that the German government was not in a position to accept obligatory arbitration, and felt that it had already conceded much in accepting the Permanent Court of Arbitration. Professor de Martens proposed as a compromise for the article in question that the words "obligatory arbitration" be suppressed, and that the four classes of cases introduced by the German government in its separate arbitration treaties be substituted for the list previously agreed upon. But Professor Zorn, in refusing the compromise, said that "when the Permanent Court should be put in operation, the opportune moment might come when, after individual experiments, a list of cases could be agreed upon obligatory for all. But to force this development unduly would be to compromise the principle of arbitration itself, with which we all sympathize."

A determined effort was then made by some members of the committee to have a majority recommendation of the disputed article reported to the commission; but the representatives of Great Britain, the United States, Italy, and Austria were opposed to departing from the rule of unanimity which had thus far been observed. The first three articles proposed by the Russian delegation were therefore withdrawn, and the fourth and fifth united to form one article, which was adopted unanimously. This article is a statement that, independently of existing general or special treaties which impose on the signatory powers the obligation to have recourse to arbitration, these powers reserve the right to conclude, either before the ratification of the present convention, or subsequent to that date, new agreements, general or particular, with the object of extending obligatory arbitration to all cases

which they may consider possible to submit to it. The only opposition or comment which this article encountered was in the commission, where M. Beldiman, of Roumania, and Professor Veljkovitch, of Servia, accepted it under the reserve that it should imply no *engagement* on the part of the signatory powers to enter into the treaties of arbitration referred to. The president of the commission remarked that there was no possibility of such an implication being contained in the article; and there was a general recognition of the fact that its adoption marked the final and definite abandonment of all plans for obligatory arbitration, however limited, so far as the first conference was concerned. But it was also generally believed that this abandonment was wise, since it was the *sine qua non* of the acceptance by Germany, and probably by several other states as well, of the Permanent Court of Arbitration.

b. The Conference of 1907

When the committee of examination turned from the question of obligatory arbitration in general to a consideration of the specific classes of cases proposed for submission to obligatory arbitration, it took up first the list submitted by the delegation from Portugal. Marquis de Soveral stated that this list was based on the treaties concluded by various powers since 1899, and on the model treaty adopted by the Interparliamentary Union at London in 1906, this latter treaty, in turn, being based on the Russian propositions submitted to the Conference of 1899 and discussed and provisionally adopted by that conference's committee of examination.

The British delegation added a number of cases to the

Portuguese list, and the Swedish and Servian delegations one each. The classes of cases voted upon numbered twenty-four, and they are enumerated below according to the number of votes they received in the committee, commencing with the six which received the largest majority (twelve votes to four, with two abstentions, for each of the six classes). The list comprised disputes relating to the interpretation and application of treaties concerning the following cases: free, reciprocal aid to sick indigents; international workingmen's protection; means of preventing collisions on the sea; systems of weights and measures; the gauging of ships; wages and estates of deceased sailors; governmental claims for pecuniary damages, when responsibility is admitted by the parties concerned; literary and artistic copyrights; regulations for commercial and industrial associations; pecuniary claims resulting from military operations, civil war, the arrest of foreigners or the seizure of their goods; sanitary laws; the exaction of taxes and imposts from foreigners, equal to those exacted from citizens; customs duties; rules concerning epizoöty, phylloxera, and other similar pests; monetary systems;[1] the acquisition and ownership of wealth by foreigners; civil or commercial procedure; pecuniary disputes arising from the interpretation of treaties of every kind; repatriation; postal, telegraph, and telephone systems; dues levied on ships (for wharfage, lighthouse service, and pilotage), and salvage dues imposed on damaged or shipwrecked vessels; private international law; geodetic questions; emigration; patents, trade-marks, and commercial names.[2]

[1] The United States delegation and seven others voted against this class, while eight delegations voted for it, and two abstained.

[2] The last class of cases received the least favorable vote: four in favor, nine against, and four abstentions.

In addition to the above twenty-four classes, there were six others proposed, but not voted upon. These were treaties in regard to: commerce and navigation; the protection of submarine cables; railways; extradition; diplomatic and consular privileges; and the fixing of territorial boundaries determined by treaties, in so far as they do not concern inhabited lands.

Some of these classes received long and earnest consideration, while many of them were not discussed at all, and some were neither discussed nor voted upon. Treaties in regard to commerce and navigation, although not voted on, received the longest consideration. The chief point of difficulty in regard to them was to decide upon some method of determining which of them are purely judicial, and neither political nor economic (judicial ones alone being subjected to obligatory arbitration, in accordance with the proposition) and which of them do not affect the essential interests or the independence of the parties in dispute (this reserve also being included in the proposition). It was deemed impossible to define "commercial treaties" in such a way as to distinguish between those which were judicial, political, etc., and the effort was made to classify them according to the matters dealt with by them; but even here, as Dr. Drago, of Argentina, pointed out, a treaty dealing with a single matter, import duties, for example, might be either or both judicial and political; and as Baron von Bieberstein, of Germany, observed, matters which are in theory judicial may become political in time of controversy. A subcommittee was appointed to analyze and classify the various kinds of commercial treaties, and it presented a report enumerating seven kinds. But each of these kinds was considered to

be liable to the above mentioned objections to the general group of commercial treaties.

This debate on commercial treaties illustrates the kinds of objections made to all of the classes of cases in the proposed list. The authors of the list, especially M. d'Oliveira, of Portugal, and Sir Edward Fry, of Great Britain, did their best to defend it. But Baron von Bieberstein, the author of most of the objections, voiced what seemed to be the dominant belief of the committee when he declared that "the question is decidedly not yet ripe, and it would be imprudent to try to answer it before it is so. . . . In prematurely voting obligatory world arbitration, we should only scatter seeds of discord among the nations."

The utmost that could be accomplished, as far as the list was concerned, was to force it, item by item, to a vote, which proved to be an indecisive one in every instance. Of the twenty-four classes voted on, only the first eight received a majority of the votes of the committee; of the eighteen countries represented on the committee, from four to nine cast adverse votes in each case. Two delegations (Germany and Austria) voted against every one of the classes; and two others (Belgium and Greece) either voted against every one, or asbtained from voting at all; while only five (France, Norway, the Netherlands, Portugal, and Servia) voted for all of them.[1]

Before proceeding to a vote on the list, sixteen of the eighteen delegations represented made explanatory declarations from which it appeared that there was a unanimous

[1] The countries represented on the committee were: Germany, the United States, Argentina, Austria, Belgium, Brazil, France, Great Britain, Greece, Italy, Mexico, Norway, the Netherlands, Portugal, Russia, Servia, Sweden, and Switzerland.

and ardent desire for the progress of obligatory arbitration in *some* form, whether under that of a general treaty or of special treaties, or under that of a list of definite classes of cases or that of a general rule.

Side by side with this four weeks debate in the committee of examination on what classes of cases should be included within a general treaty, a twofold struggle progressed, on the one hand, to prevent the adoption of any general treaty whatever and, on the other hand, to secure the adoption of a treaty embodying a general rule. This struggle continued through four weeks in the committee of examination, and through seven meetings of the I Commission.

The ideal of obligatory arbitration by means of separate treaties, instead of by a general treaty adopted by the conference, was foreshadowed, as has been seen, in Baron von Bieberstein's address before the first subcommission in the course of the preliminary discussion. It was taken up in earnest, in the committee of examination, by Dr. Kriege, of Germany, who stated emphatically that the German delegation would vote against every proposition to establish obligatory arbitration by means of a world treaty. With the same emphasis and frankness, Dr. Kriege stated the delegation's reasons for this opposition to be, first, that the reservations accompanying these propositions, such as the exemption of those questions which concern the honor, independence, and vital interests of states, reduce the propositions merely to the *name* of obligatory arbitration; second, that the necessity of each dispute being passed upon by a legislative body, such as the United States Senate, still further reduces the chance of any real arbitration; third, the fact that the authors of

these propositions deem it necessary to hedge the agreement around with such precautions shows only a mediocre confidence even on their part in the vitality or utility of the institution; and, finally, the adoption of a world treaty would seriously jeopardize the devolopment of genuine obligatory arbitration by barring the path of governments which would be disposed to engage themselves by separate treaties with other states to have recourse to arbitration for differences where this would be possible as between only two states.

On the other hand, the United States proposition for a world treaty couched in general terms was championed by those who were determined to have obligatory arbitration adopted by the conference of all the world. This proposition was that "differences of a judicial kind, and before all those relating to the interpretation of treaties existing between two or more of the contracting states, which may arise between the said states in the future, and which shall not have been settled by diplomatic means, shall be submitted to arbitration, on the condition that they affect neither the vital interests nor the independence or honor of either of the said states, and that they do not affect the interests of other states not parties to the controversy." The decision as to the relation of any case to vital interests, independence, and honor is left by the proposition to each of the signatory powers.

The advocates of this proposition argued that its reservations were desirable in themselves and necessary to its adoption; that they existed in most separate treaties, and would not prevent all arbitration in a general treaty any more than they had done in separate treaties; and that a general treaty would not hinder the conclusion of

separate treaties side by side with it, but would give the sanction of the whole civilized world, in a very emphatic form, to the principle of obligatory arbitration, and thus aid greatly its progress in the submission of more and more cases under the general treaty, and in the conclusion of more and more separate treaties as well.

The American general proposition was united with the Anglo-Portuguese list of specific cases, and was championed in the committee by the advocates of both. On the other hand, the entire frankness of Dr. Kriege was replaced by the skill in diplomacy and debate of Baron von Bieberstein, who was ably seconded by the energy and determination of M. Merey, of Austria. Under the lead of the Baron, the opposition took the form of suggesting problems whose solution was found to be most difficult. These problems were: What would be the force of an arbitral award under a general treaty as far as the powers not parties to the dispute are concerned: would it have the binding force of a precedent upon them also? Again, suppose that an arbitral award required the passage of certain legislative measures: how can the executive power in such countries as Great Britain, France, the United States, etc., enforce the award if the legislative power is opposed to the enactment of the requisite laws? Again, how can such a distinction be made between cases coming under the jurisdiction of national courts and those subject to international arbitration, which will not reduce the latter class of cases to almost nothing? And, finally, how can the United States government enter into any world treaty of genuine obligatory arbitration if the United States Senate must exercise the right of approving, not only the world treaty itself, but also a special treaty

determining the object, scope, etc., of the arbitration for every individual dispute? [1]

Each one of these problems, except the last, was pushed by Baron von Bieberstein and his allies through from three to five meetings of the committee, and each one, except the last, had to be referred to a special subcommittee for solution; while the last question was the subject of an animated debate between Count Tornielli, of Italy, M. Merey, of Austria, and Dr. Scott, of the United States. On the other hand, the majority of the committee, who were in favor of the general proposition and a list of specific cases, showed great fertility of resource in suggesting possible solutions of knotty problems; in insisting that these problems exist and must be met in separate treaties as well as in a general one; in emphasizing the demands of public opinion in every civilized country for obligatory arbitration under some general form; in forcing every proposition to a vote which should reveal the exact position of each government; and in proposing new plans or combinations of plans, one of which might secure a decided majority.

The general proposition of the United States, above noted, received a vote in the committee of fourteen against two, with two abstentions.[2] The committee also adopted [3] an article providing that the signatory powers agree to submit to arbitration, *without reserve*, *some* list of definite classes of disputes; but no larger majority could be secured for the proposed list on the second reading than had been secured on the first.[4] And with these results of its four

[1] The provision in Article 4 of the United States proposition.

[2] Germany and Austria voted against it; Belgium and Greece abstained.

[3] By a vote of thirteen to five; Switzerland here joined the minority of four just noted.

[4] See pages 332 and 334.

weeks discussion, the committee reported to the commission.

The commission devoted seven sessions to the consideration of the report, and first listened to twenty-three addresses on the general subject. These addresses were made by the representatives of nearly a score of countries and showed an apparently irreconcilable divergence of opinion as to the desirability or possibility of adopting a general treaty of obligatory arbitration. The opposition to the report was commenced with a pessimistic speech by M. Beldiman, of Roumania, who was answered in an optimistic one by the Marquis de Soveral. Belgium, Switzerland, Greece, and Turkey were the other "small powers" whose representatives also voiced the opposition, chiefly for the reason that they were opposed to giving up the reserves of honor, independence, and essential interests for any cases whatsoever; Argentina, Servia, Persia, Denmark, China, and Siam were the other "small powers" who furnished spokesmen in favor of the report. The brunt of the opposition was borne chiefly by the Baron von Bieberstein, assisted by M. Merey; and their arguments were answered by Ambassador Choate and Dr. Scott, Dr. Drago, M. Bourgeois and Professor Renault of France, Sir Edward Fry, and Professor de Martens of Russia.

All of the arguments of the opposition in the committee were again advanced in new form and emphasis, in the truly titanic debate in the commission, and were again answered from the standpoint of jurists, diplomatists, and statesmen. Together with profound and subtle discussions of international and constitutional law, some of the addresses were replete with clever retorts and sparkling passages.

"In a world treaty of obligatory arbitration," said the Baron, "the obligation shines on paper, but is eclipsed at the moment when it should be put into practice. . . . This project has a defect which, according to my opinion, is the worst of all in legislation and the conclusion of treaties: it makes promises which it cannot fulfill. It calls itself obligatory, and is not so. It boasts of being a step in advance, and is not so in the least. It vaunts itself as an efficient means of settling international disputes, and in reality it enriches our international law with a series of problems of interpretation which will very often be more difficult to solve than the original disputes, and which will even be of a kind to embitter the disputes. It has been said that this project wins for the world the principle of obligatory arbitration. No! For this principle has already been won in theory by the unanimous desire of the nations, and in practice by a long series, ever increasing, of separate treaties. Germany, which hesitated eight years ago, has concluded, on the separate system, treaties of obligatory arbitration both in general terms and on specified subjects; it will follow the same course in the future. . . . The great ideas destined to rule the world hew their way by their own strength; they flourish and triumph in the sunshine of individual liberty, and they can *not* endure the shade of general principles, of lists and categories. This is a belief which in our day, it seems, is old fashioned and out of date; but experience is in its favor. . . . The long and assiduous labor which we have devoted to the question of arbitration has had only a partial success. But we have entered the domain of obligatory arbitration, we have explored it in its entire extent, and we have reported on the difficulties to be overcome. And if we do not take with us from The Hague a world treaty, we shall present to our governments the fruits of our toil which will aid them to continue, in full appreciation of it, their journey towards the noble ideal of general and universal obligatory arbitration. It is true that the method which I extol will be less brilliant, but we can console ourselves with the certain knowledge that we are traversing a sure route, and that our disinterested labor will serve the great cause which is dear and common to us all."

". . . The matters which compose this list," said Dr. Drago, "however inconsiderable they may appear when studied singly, apart from the series which they form, have nevertheless a great significance

when considered all together, as the first sign of life in the principle which we have all accepted. They are the first shoots of the sapling which should grow into the great king of the forest. They appear to have a very slender value; but if you crush them, the sapling will perish and all will be lost. . . . In the experimental affairs of government and politics, it is only rarely that things attain at one leap the goal of our aspirations; they are much more often the result of indirect growth than of the incarnation of a theoretical conception, — and are more perfect because of that very fact. . . . The probable difficulties are certainly not those which we may imagine at present. Here, as in all things, the unexpected must be allowed for. Some time ago, the eminent English jurist, Mr. Bryce, published an admirable study to show that not one of the anticipations and fears of the authors of the Constitution of the United States and of their contemporaries, not one of the disadvantages which the great talent of M. de Tocqueville foresaw later, have appeared in the long experience of much more than a century; and that American statesmen have had to struggle with wholly different difficulties than could have been foreseen or imagined in advance. Do not let us then be paralyzed by the *fear of the subjunctive*, by imagining what might happen but which happens rarely. . . . Hence it is that the project of to-day, incomplete as it may seem, plays a rôle which is eminently practical; it prepares the way, it clears the field, it saves time for those who follow us. . . . To the civilization which is supported by weapons shall succeed, in a more or less distant time, a civilization founded on arbitration and justice, a superior civilization which is neither force, nor power, nor riches, but rather the tranquil triumph of justice for the weak as well as for the strong."

Dr. Drago and Professor Renault made a searching analysis of, and a powerful answer to, the objections advanced by Baron von Bieberstein, while Ambassador Choate, who spoke after them, contented himself with more general observations and turned upon the Baron, with entire good nature, in this fashion:

"I desire to reply to the important discourse of Baron von Bieberstein with all the deference and consideration due to the potent

Empire which he represents and to his own devotion and rare personal merits. It seems to me that there exist in this conference *two* first delegates from Germany, with two different voices. Baron von Bieberstein is, on one side, an ardent admirer of obligatory arbitration in the abstract, but, on the other, when this idea is to be put into practice, he becomes its most formidable opponent. It is for him an image which he adores in the sky, but which loses all its charm on touching the ground; he regards it in his dreams as a celestial vision, but when it approaches him, he turns towards the wall and will not look at it.[1]

". . . According to our opponents," Mr. Choate continued, "we must content ourselves with these separate treaties, and halt before the idea of a general world treaty. They accept our proposal for an agreement, but solely on condition that it be not a universal agreement. And why? A nation which can come to an agreement with a score of other nations, can it not agree with two score if such is the imperious desire of all the nations? . . . Every power, great or small, must bow before the will of public opinion, which has declared, and will declare more and more decidedly from this time forth, that every useless war must be avoided, and that every war *is* useless when recourse to arbitration is possible."[2]

Sir Edward Fry replied to Baron von Bieberstein's "subtle and minute critique" by saying that he had succeeded in proving the uselessness of the identical provision in the treaty of obligatory arbitration concluded between Germany and Great Britain in the month of July, 1904. He admitted that in view of the reservations in the proposed treaty, its obligatory character is not very pronounced and the "vinculum juris" can be broken without difficulty.

[1] Baron von Bieberstein, in a very brief and friendly reply to this sally, insisted that the minutes would prove the entire consistency of his devotion to the right kind of obligatory arbitration.

[2] Mr. Choate's address was made in English, and immediately repeated to the commission in French, without any preparation or forewarning, by Baron d'Estournelles de Constant, of France.

"But," he repeated, "the nations of the world are not controlled solely by juristic ideas or bound solely by 'vincula juris,' and I believe that the treaty, however weak it may be from the legal point of view, will have none the less a very great moral value as being the expression of the conscience of the civilized world. A law passed by a people is inseparable from the moral ideal which has inspired it; we can not pronounce a divorce between the moral conception and the law which is its expression. It is certain that, just as a law can be of any utility only when it rests on general consent, a moral ideal gains by being expressed in terms of law."

M. Merey commenced his speech in opposition to the treaty by declaring that he was, up to a certain point, a partisan of obligatory arbitration properly so-called, that is to say, without restriction or reserves, and that he was not a purely Platonic partisan of it. He asserted that the adoption of the proposed treaty would contribute nothing to the peace of the world or to the satisfaction of the demands of humanity; and that, like certain modest and inoffensive family medicines, obligatory arbitration would, if applied to all maladies indiscriminately, exaggerate some and produce others even worse. The members of the conference, he said, not being specialists in regard to the various matters in the proposed list, would not escape the evils from which they suffered at present, but would fly to those they knew not of.

M. Bourgeois, presiding over the commission and summing up its long debate, expressed appreciation of the work of both the progressive majority and the conservative minority in opposition: "For it is by this 'contradictory collaboration' that *all* the light is produced." He then pointed out the points on which all were united, namely, the acceptance of the principle of obligatory arbitration, rejoicing over the thirty-three treaties of permanent obli-

gatory arbitration concluded since 1899, and the conviction that obligatory arbitration can be applied to *all* juristic differences and those relative to the interpretation of treaties. The two points of divergence he stated to be: whether obligatory arbitration should be established by a general treaty, under the reserves of independence and vital interests, for judicial disputes and those relating to the interpretation of treaties; and whether, for some of these disputes, obligatory arbitration without reserves should be established by a general treaty. The opposition seemed to him to be more pronounced against the first point than against the second. After stating what appeared to him to be some of the advantages of a general treaty over separate treaties of obligatory arbitration, M. Bourgeois concluded his address with the words:

"By thus establishing in their midst a realm open alike to every civilized state and subject exclusively and by obligation to the rule of law, the powers represented at The Hague will not only promote, decisively and more rapidly than by any other means, the great cause of arbitration, but they will also declare, as they could not do in any other way, a common good will and respect for international law, a common feeling of moral obligation for international duty. And this will be, perhaps, the highest lesson which can be given to men."

The general discussion having ended, the commission considered and voted upon the various parts of the plan. Two features of this consideration may be noted. One of the items gave occasion to M. Merey to make one more vigorous criticism of the part played by the United States Senate in the ratification of treaties, and he was again answered concisely but emphatically by Dr. Scott and Professor Renault. Another item which provided for the

exemption from obligatory arbitration of disputes in regard to the interpretation or application of extraterritorial rights, caused the delegations from China, Persia, and Siam to declare that they would not sign the treaty with this item in it. Thereupon the delegations from the United States, Germany, and Russia moved to strike out the item as offensive and unnecessary, and the motion was carried by a vote of thirty-six to two,[1] with five abstentions.

When the commission proceeded to a vote on the various parts of the plan for obligatory arbitration, it was found that the minority was only a trifle less strong, numerically, than it had been in the committee. The American proposition of obligatory arbitration for judicial disputes and those relating to the interpretation and application of treaties, under the reserves of vital interests, independence, honor, and the interests of third parties, received a vote of thirty-five to nine in the commission, as against fourteen to four in the committee; obligatory arbitration, without any reserves, for *some* list of cases, received a vote of thirty-three to eleven in the commission, as against thirteen to five in the committee; and obligatory arbitration, without any reserves, for the *proposed* list of cases, received a vote of thirty-one to thirteen in the commission, as against thirteen to six in the committee.[2]

No sooner had the vote shown the strength of the minority than it began to propose the passage of resolutions (*vœux*) designed to shelve the whole question. M. Merey

[1] Great Britain and France voted for the retention of the provision.

[2] The minority in the commission included the delegations of Germany, Austria, Greece, Roumania, and Turkey, which invariably voted in the negative; the delegations of Belgium, Bulgaria, and Switzerland, which usually voted in the negative; and the delegations of Japan, Luxemburg, and Montenegro, which invariably abstained.

had proposed a resolution in the committee and urged its adoption as the committee's report; he now renewed in the commission the motion of his resolution, which stated that the conference, being convinced that certain strictly defined matters are capable of being submitted to obligatory arbitration without any restriction whatever, but being unable to decide upon those matters because of their technical character and its own lack of special knowledge and experience regarding them, resolved to invite the governments themselves to enter upon a profound study of the said matters, after the adjournment of the conference, and to inform each other, through the medium of the Netherlands government, of those which they may be ready to make the subjects of a treaty of obligatory arbitration.

Sir Edward Fry opposed this resolution for the reason that the vote had shown the readiness of a number of governments to enter at once into such a treaty. And Ambassador Choate objected vigorously to a small minority of states preventing a large majority from accomplishing their desire and their duty. This caused M. Merey to reply that, since the conference was a diplomatic and not a parliamentary body, there could be no question of minority and majority. M. Nelidow, of Russia, president of the conference, and Baron von Bieberstein confirmed M. Merey's view of majority and minority, and said that if the rule of unanimity on all important measures and approximate unanimity on subordinate measures were not strictly adhered to by the conference, all future international conferences would be jeopardized. But the commission would not "stultify itself" by adopting the Austrian resolution, and rejected it by a vote of thirty to fourteen.

Having reached this apparent cul-de-sac, the commission

yielded to the persuasive diplomacy of Count Tornielli, who had nearly always voted with the majority. It was no time, he said, for long speeches, but there were some statements of fact as to the work accomplished which should be made. Let these statements be embodied in a resolution. "And then," he continued, "let us wisely stop there. We have done a good day's work. Let us be satisfied with the work accomplished, and leave it to time to ripen its fruit. If, in looking back, some of us experience some regret at seeing certain tasks unaccomplished, in turning our eyes towards the future, we are all filled with confidence, and not the least discouragement weighs on our spirits." Members of the minority heartily approved this suggestion, as did M. Bourgeois, on behalf of the majority and the commission. "It must be known to the world," said the latter, "that the cause of obligatory arbitration issues from the second Peace Conference victorious and not vanquished."

M. Bourgeois and M. Nelidow were accordingly appointed a committee to report a resolution, which they did in the following words:

"The commission, in accord with the spirit of harmony and of mutual concessions, which is the very soul of the Peace Conference, has resolved to present to the conference the following declaration which, while reserving to each of the states represented the credit of its votes, permits them all to affirm the principles which they consider to be unanimously recognized. The commission is unanimous, first, in recognizing the principle of obligatory arbitration; second, in declaring that certain differences, and especially those relating to the interpretation and application of international treaties, are capable of being submitted to obligatory arbitration without any restriction whatever. It is unanimous, finally, in proclaiming that, though it has not been able to conclude at present a convention of this tenor, the diversities of opinion which have been revealed have not exceeded the

bounds of a juristic controversy, and that, in laboring here together during four months, all the states of the world have not only learned to understand and approach each other more closely, but have revealed in the course of their long collaboration a very exalted feeling for the common welfare of humanity."

When this resolution was presented, the representatives of Belgium and Roumania at once accepted it in the spirit of conciliation. But Mr. Choate, on behalf of the American delegation, opposed its adoption, "not," he said, "because we are not in favor of the principle of obligatory arbitration, for that is what we have struggled for from the beginning; but because it is in reality a surrender by the commission of the advanced position which, by a vote so decisive, it has already attained." Sir Edward Fry, on the other hand, said: "I regret with all my heart that the project will not be presented to the conference. I regret equally that the United States of America does not feel able to give an affirmative vote on the declaration presented to us. But I regard this declaration as a statement of things already accomplished by the commission and not as a surrender of its results." M. Nelidow then made a short appeal for unanimity, and the president put the resolution to a vote, with the result that it was adopted unanimously, except for four abstentions (the United States, Haiti, Japan, and Turkey [1]).

At a subsequent plenary session of the conference, the above resolution was adopted, without discussion, by an affirmative vote of forty-one, with three abstentions (the United States, Japan and Turkey).

[1] The Japanese delegation stated, as its reason for abstaining from the vote, the fact that it had taken no part in the discussion of the question of obligatory arbitration; and the Turkish delegation said that it abstained because of lack of instructions.

3. The Forcible Collection of Debts

a. The Conference of 1899

One of the classes of cases proposed by the Russian delegation for submission to obligatory arbitration was that which includes differences or claims relating to pecuniary damages suffered by one state or its citizens as the result of the illegal action or the negligence of another state or its citizens.

Professor de Martens explained that this was not meant to apply to disputes between the citizens of one state and the citizens of another, except when a government takes up the cause of its citizens. M. de Staal, of Russia, proposed to add the words "in so far as they are not within the competence of the local authorities." But on the motion of Sir Julian Pauncefote, of Great Britain, the wording adopted by the committee, on the first reading, was simply "differences or claims relating to pecuniary damages."

It was found on further consideration, however, that at least three distinct questions were connected with this simple phraseology. First, shall the arbitration have to do with the *responsibility* of the state against whom or whose citizens the claim is made? The committee answered this question in the negative by a vote of six to four.[1] Second, the responsibility is admitted, shall the arbitration have to do with the *amount of the damages* claimed? This question was answered unanimously in the affirmative. Third, shall the arbitration cease to be obligatory when the dam-

[1] The majority vote was cast by the representatives of France, the United States, Austria, Great Britain, Russia, and Germany.

ages awarded are above a certain sum; in other words, shall a maximum limit of indemnity be fixed in cases of obligatory arbitration? The committee answered this question in the negative by a vote of seven to three.[1]

After these preliminary votes, the article was so stated as to include "differences or disputes relating to the determination of the amount of pecuniary damages, when the responsibility for the damages has been previously admitted." But although the article as thus stated was agreed to unanimously by the committee, it was later discarded, together with all the other specific cases proposed for obligatory arbitration. Its failure was much regretted, both because of the frequency and troublesome character of such disputes and because, as shown by Professor de Martens in the course of the debate, they have formed the large majority of disputes submitted to arbitration, and hence have proven themselves especially adaptable to such solution.

b. The Conference of 1907

On the list of cases proposed by Great Britain's delegation for submission to obligatory arbitration without any reserve were included "pecuniary claims for the principal of damages when the right of indemnity is recognized by the parties to the case." This proposition had been made in 1899 by Russia, had been carefully discussed and unanimously passed by the committee of examination, and discarded, together with all cases proposed for obligatory arbitration. In 1907 it was submitted to a vote, without discussion, in the committee of examination, and

[1] The minority vote was cast by the representatives of the United States, Great Britain, and Germany.

was adopted by a vote of eleven to four, with three abstentions.

The Swedish delegation also proposed as an addition to the British list "pecuniary controversies relating to the interpretation or application of treaties of every kind," and also "pecuniary controversies caused by military operations, civil war, or so-called 'peaceful' blockade, or by the arrest of strangers or seizure of their goods." The committee adopted, without discussion, the first of these propositions by a vote of nine to six, with three abstentions; and, after striking out (by a vote of six to two, with ten abstentions) the words "or so-called peaceful blockade," as not pertaining to its work, the committee adopted the second proposition also by a vote of seven to six, with five abstentions.

The three propositions above stated were again voted, on the second reading, by the committee of examination, and with about the same feeble majorities. But only the British proposition was voted on by the commission, which adopted it, also without discussion, by a vote of thirty-one to eight, with five abstentions; and when the commission decided not to report the proposed list of cases for obligatory arbitration, this proposition also failed with the others.

The propositions made in 1899 and 1907 in regard to obligatory arbitration for pecuniary claims, which have thus far been referred to, had to do only with controversies in regard to damages, and not with pecuniary claims arising from the contracted indebtedness of states to individuals. This latter class of claims was made the subject of a most important proposition in 1907, presented by the delegation of the United States and known as the "Porter Proposition."

At the second plenary session of the conference, on the 19th of June, and at the first meeting of the I Commission, three days later, General Horace Porter announced on behalf of the United States delegation that he would present a proposition for "an agreement to observe some restrictions on the subject of the use of force in the collection of ordinary public debts arising from contracts."

This proposition was duly presented and, with a slight amendment made by the United States delegation itself, read as follows:

"With the object of preventing between nations armed conflicts of a purely pecuniary origin, arising from contractual debts (*dettes contractuelles*), claimed by the government of one country as due to its citizens, the Signatory Powers agree not to have recourse to armed force for the collection of such contractual debts. However, this stipulation is not to be enforced when the debtor state refuses or leaves unanswered an offer of arbitration; or, if accepting it, makes impossible the establishment of the compromise;[1] or, after the arbitration, fails to comply with the terms of the award. It is further agreed that the arbitration referred to will be suitable for the procedure described in Chapter III of the Convention for the Peaceful Settlement of International Differences adopted at The Hague, and that it will determine, unless agreement has been made to the contrary, the justice and the amount of the debt and the time and manner of its payment."

When the subcommission took up the consideration of this proposition, on the 16th of July, General Porter opened the discussion by a clear and forceful address.

"There exists," he said, "a general and a growing belief that the use of armed force for the collection of a contractual debt from a debtor nation, unless it is restrained by some general international agreement,

[1] The *compromis* is an agreement as to the precise question to be arbitrated, the time, place, and mode of the arbitration, etc.

may become the most prolific source of conflicts, or may at least occasion peaceful blockades, threats of hostilities, or rumors of warlike intentions well adapted to the disturbance of commerce, the unfavorable depression of markets and the creation of a feeling of uneasiness, and thus disturb not only the countries interested in the quarrel, but even those who are strangers to it.

"If the debtor nation resists, war becomes inevitable. If, to enforce payment, recourse is had to what is called "a peaceful blockade," there is a growing tendency on the part of neutral commercial nations to disregard it, and war must be declared in order to render it effective. It may be, in addition, that other states have claims to assert against the same country; they will not fail to protest against arbitrary seizure practiced by a single creditor upon the property of their common debtor.

"The case most frequently in evidence is that of a capitalist or speculator who, depriving his own country of his services and money, goes to make an adventure in a foreign land with the sole object of increasing his private fortune. If he gains millions, he will not divide his profits with his government; but if he loses, he will go to it to demand that war be made to secure for him the sums which he pretends are due him and which are often enormously exaggerated. The onerous conditions imposed on the loan prove that the lender recognizes the greatness of the risk which he runs. Very often he buys on the market at a low price certificates of indebtedness issued by the debtor state in question, and demands that they be paid to him at par. In fact, in the game which he plays, he counts on putting into practice the principle of 'Heads, I win; tails, you lose.'

"The minister of foreign affairs in his own country, to whom he appeals, has usually not adequate means at his disposal of making a complete investigation of the matter, of procuring and examining all the necessary documents, of ascertaining the evidence of the adverse party, and of forming an exact idea of the true merits of the case submitted to him. He has no jury to establish the facts, no competent and impartial court to pass on the question of jurisprudence, no tribunal to decide on the equity of the claim. If he makes a decision, he will know that he is violating one of the fundamental principles of the administration of justice by admitting that a sentence may be rendered by one alone of the parties interested in the dispute.

"If the amount of the claim is collected by a means as severe as the use of armed force, the taxpayers of the nation resorting to force must pay for the enrichment of a capitalist or speculator who desired to run the risk of winning or losing in a foreign country, even though the expense of the collection is a hundred times as great as the amount of the claim.

"Among the questions with which a minister of foreign affairs may have to be engaged, there is perhaps none more annoying or more perplexing than the pecuniary claims of individuals against a foreign government when they are formulated according to the estimates of the interested parties themselves, and for which payment is demanded even though this may entail the terrible consequence of military operations. If capitalists or speculators, engaging in financial transactions with a foreign government, could be told that they must act according to the principle of *caveat emptor;* or if they could be given to understand, at least, that the government of their country would not put its means of coercion at the service of their claims, except in so far as the latter have been legalized by a judicial decision, or a competent court or arbitral tribunal has established their true value and the debtor nation has then arbitrarily refused to submit to the decision, — if such a stand could be taken, state departments would be relieved of one of their most vexatious and difficult duties.

"History establishes the fact that the majority of such claims present a truly astonishing exaggeration of the sums due. Statistics show that during the last sixty years mixed commissions and arbitral tribunals have examined thirteen of the most important demands for damages, indemnities, or unpaid contractual debts, claimed by the subjects or citizens of one country as due by the government of another country. The largest sum allowed in any single case was only eighty per cent of the total claim, while in some cases the percentage fell to the ridiculous amount of three quarters of one per cent.

"One of our American citizens some time ago made a contract with a foreign government permitting him to manufacture materials of construction. Difficulties arose in the execution of the contract, and it was cancelled. The grantee took advantage of this to demand an indemnity of about 450,000 francs, which was refused him. He secured the aid of the United States government for his cause, and

after long correspondence, proceedings, and negotiations, the government sent a fleet of nineteen war ships to support the American claim. Finally, after sixteen years of effort, our government was not able to recover a single centime, and it had spent more than twelve millions [of francs] to reach this conclusion. We consider this lesson instructive, but also expensive. To use a current expression: 'The game is not worth the candle.'

"It sometimes happens that the citizens of one power procure a decision from their government to send a fleet to constrain another government because of a default in the payment of interest on notes held by them. The report of such a measure causes a rise of prices. The citizens referred to profit by this to sell their notes at a profit, in foreign markets, so that after the claimant power has incurred expense and effort to enforce payment, the profit of it goes chiefly to foreigners.

"These examples alone should forever deter civilized nations from resorting to arbitrary measures of coercion to impose on a foreign government the payment of a debt (that is to say, of a contractual debt) which has not been definitely ratified by an impartial tribunal.

"Such coercitive measures are equivalent to the practice once in vogue of imprisoning individuals for debt, except that this constraint could not be enforced upon a debtor unless a competent tribunal had regularly given a judgment in favor of the creditor. Just as the maintenance of the debtor became an expense to the state, and as his confinement prevented him from earning something to pay his debt and even to provide for the needs of his family, so the blockade of a port of a debtor nation and the destruction of its wealth through the interruption of its foreign commerce by means of hostile fleets and armies, deprive it of the revenues which it derives from its customs duties, and may even oblige it to incur expense for opposing force to force. This results only in decreasing its means of paying its debts. Imprisonment for debt, in the case of individuals, came to be regarded as illogical, cruel, and ineffective, and was generally abolished. The analogous practice employed by nations against a debtor state should be likewise abandoned.

"Forced collections may occasion a demand for immediate payment at a time when the debtor nation, having had to suffer, perhaps, from an insurrection, a revolution, the failure of its crops, an inundation, an earthquake, or some other calamity which it could not pre-

vent, has not the means of immediate payment, although it could honor its obligations if accorded a reasonable delay. Numerous examples could be cited of states which at one time found themselves unable to pay their debts at maturity, but which, having procured a suitable delay, paid in full, interest included, all their obligations, and now enjoy good credit in the family of nations.

"Neither the prestige nor the honor of a state can be considered as brought into question, if it refuse to compel by force the payment of a contractual debt due, or claimed as due, to one of its citizens from another government. Nor have its citizens the slightest right to demand that a private contract be converted into a national obligation. If such were the case, it would be nearly equivalent to their having, from the beginning, their own government as guarantor of the payment.

"The most eminent writers on international law are of opinion that the state has not the least obligation in this matter towards its subjects or citizens, and that its action in such cases is purely optional. Although these authors differ as to the *utility* of intervention, researches show that the majority of them admit that the *duty* of intervention does not exist."

General Porter here quoted from a number of eminent statesmen, diplomatists, and jurisconsults to prove this assertion. Among them were Lord Palmerston (1848), Lord John Russell (1861), Lord Salisbury (1880), Alexander Hamilton (1787), Hamilton Fish (1871), James G. Blaine (1881), Secretary Bayard (1885), and President Roosevelt (1906).

"We see," he continued, "that modern public opinion is resolutely opposed to the collection of contractual debts by force. . . . Among modern jurisconsults best versed in questions of international law who deny the *right* of intervention, or admit the principle of nonintervention with or without reserves, may be cited De Martens, Bonfils, Heffter, Woolsey, Wilson and Tucker, Walker, De Floecker, Liszt, Despagnet, Rivier, Nys, Merignac, and others. It is unnecessary to recall the consideration and profound study of this subject by the

Argentine Republic, and the complete discussion of this question, and of various others relating to it, contained in the works of the former Secretary of State of that Republic, at present one of our highly esteemed colleagues in this conference. . . .

"Expeditions undertaken for the purpose of collecting debts have rarely been successful. It would be to assume a grave responsibility in our era to relegate contested pecuniary claims to the domain of force, instead of placing them under the régime of law, and thus to substitute the science of destruction for the fruitful arts of peace.

"The principle of nonintervention by force would be an inestimable blessing to all the parties interested. First, to the nation whose citizens have become creditors of a foreign government; for this would be a warning to a class of persons too prone to speculate on the necessities of a weak and embarrassed government, and who count on their own for the success of their operations. It would permit their government to continue to entertain normal relations with the foreign government; it would avoid incurring its ill will and, perhaps, the loss of its commerce. It would free it also from the risk of complications with neutral powers.

"Secondly, the recognition of this principle would be a genuine relief to neutrals; for blockades and hostilities, by arresting all traffic, are a serious menace to their foreign commerce.

"Thirdly, debtor states would be benefited by it; for it would prevent lenders of money from counting, as a basis of their operations, on anything but governmental good faith, national credit, the justice of local tribunals, and the economy pertaining to the administration of public affairs. It would deliver these states from the importunities of adventurous speculators who tempt them by the offer of great loans, which are often the prelude to national extravagance, and finally threaten to seize their property and violate their sovereignty. The certainty that all disputed pecuniary claims would be submitted to the valuation of an impartial tribunal would be calculated to make great financiers, great promoters, understand that their claims would be promptly passed upon, without serious difficulty in the country's administration of its public affairs, and without their being personally obliged to assume the task of inducing their own government to charge itself with collecting their dues by force of arms. Under such conditions, foreign financiers and financial establishments, supplied with

every guarantee, would be more disposed to negotiate loans, and would make easy and reasonable terms. . . .

"One of the significant features of this conference is the fact that, for the first time in history, the creditor and debtor nations of the world have come together in friendly counsel. The occasion seems, then, to be the most auspicious possible for a serious effort to come to an agreement on some regulations as to the treatment of contractual debts, — regulations which, having received the approval of this assembly, may form a general treaty on the subject between the nations here represented, for the true interests and peace of the world."

The project thus ably launched did finally reach the haven of a general treaty adopted by the conference; but its voyage was a long and somewhat stormy one. At least ten threatening dangers, in the shape of opposing arguments, had to be passed through or avoided. These dangers loomed up both in the subcommission, the committee of examination, the commission, and the plenary session of the conference; and it was only by persistent, diplomatic, and fearless skill that success was finally achieved. While the conference was almost unanimous in indorsing the principle of the proposition, its opponents on the one side claimed that it went too far, and its opponents on the other side claimed that it did not go nearly far enough. The latter class were the more numerous, and among them were most of the American republics.

Dr. Drago, of Argentina, to whom General Porter had gracefully referred, expounded the well-known "Drago Doctrine" in a statesmanlike and careful address. The three objections which he urged to the "Porter Proposition" were, first, that it did not restrict the arbitration of debts arising from ordinary contracts solely to those cases in which the courts of the debtor country had been previously appealed to and had refused justice; second, that

it seemed to include public debts as subject to arbitration; and, third, that it did not absolutely exclude military aggression, or the occupation of American soil, as the result of disputes in regard to public debts.

The first of these objections was adhered to by the representatives of Mexico, Venezuela, Uruguay, Nicaragua, Paraguay, Peru, Ecuador, Guatemala, and Switzerland. It was supported by Dr. Drago on the ground that "No real difficulty exists [in exhausting local means of collecting debts, before proceeding with diplomatic measures], because there are everywhere tribunals or courts of claims with the jurisdiction necessary to take cognizance of this class of disputes. In the Argentine Republic, as well as in most of the South American states, the government can be made party to a suit without the necessity of obtaining its previous consent. In this respect we have gone farther than the United States, which is inspired by the principles proclaimed by Hamilton, one of the authors of the *Federalist*, according to whom the nation can not, any more than the states which form it, be summoned before the courts (Chapter 81)." "The fact that one state can not intervene in the affairs of another state," said M. La Barra, of Mexico, "unless it be under the exceptional circumstances determined by international law, is a natural consequence of the sovereignty and independence of states." "The states of Europe," said M. Castro, of Uruguay, "should not apply to America other rules of conduct than those of international law, which regulates their relations with each other. America has a good right to such treatment, for it is entirely civilized." "When a government dealing with foreigners," said M. Candamo, of Peru, "has specified in the contract that differences which may arise shall be

settled by the judges and tribunals of the country, it is before them that the affair must necessarily be brought."

Dr. Drago's second objection to the Porter Proposition was adhered to by the representatives of Uruguay, Nicaragua, Colombia, Paraguay, Peru, Guatemala, and Servia. It was supported by Dr. Drago for the reason that public debts are very different from other classes of indebtedness and should not be treated like them in being subjected to arbitration. "They are put into circulation," he said, "by virtue of legislative authorization which proceeds directly from national sovereignty and is inseparable from it. The issue of bonds or public funds, like that of money, is in fact a positive manifestation of sovereignty. It is by an act of sovereignty that a state ordains the payment of coupons on maturity, and it is quite obvious that it is by an act of the same character that it determines, in some exceptional cases, the suspension of the payment of the debt. On the other hand, there is no individual creditor who has contracted directly with the government; it is an indistinct, unnamed person, who acquired its certificates at their actual market value, which is more or less variable; but the certificates bear always, from the beginning, their risks and their certainties, which are perfectly indicated by their quotation. . . . It is certainly a fact that, though the juristic distinction between ordinary contracts and certificates constituting the public debt were not clearly established, as it is, from the point of view of principles, we may always arrive at this conclusion in a practical manner, since everywhere tribunals exist for the first class, while there are nowhere any to adjudicate the second class." The representatives of the other South American states mentioned above did not attempt to argue this phase of the

Drago Doctrine, but contented themselves with expressing their acceptance of it. M. Ruy Barbosa, of Brazil, on the other hand, in a very learned and ample address, frankly rejected, for himself and for every thinker and publicist in Brazil, the Drago Doctrine in its entirety. He attacked the heart of the doctrine by denying that the sovereignty of a state is a legitimate barrier to compelling it to pay its bonded indebtedness.

That sovereignty which in the United States, Dr. Drago said, had been made impeccable, M. Barbosa declared has been restricted by the federal courts.

"The most original and the most commendable trait of the United States Constitution," said the latter, ". . . is that justice has been placed as a sacred limit and impassable barrier to sovereignty. . . . What is it, then, which is lacking in sovereignty to place it, in the domain of justice, on the same plane as individuals, in this matter of civil obligations? Solely the seizability of its goods.[1] . . . It is the first time that between nation and nation, between sovereignty and sovereignty, an appeal has been made to the internal, domestic rule of the nonseizability of the state's goods, to establish the illegitimacy of war. War is never considered unjust because the patrimony of a sovereignty is inaccessible to military seizure; what makes wars unjust, is the injustice of their motives. . . . In this system, then, a government's certificate would not be a juristic agreement, but an act of confidence. . . . But, truly, the theory once consolidated in law that states in borrowing contract no coercitive obligation whatever, that is to say, that their creditors are entirely disarmed towards them, can any one believe that there would still be capitalists foolish enough to intrust their wealth to such privileged beings? . . . This theory is not the theory of the right of sovereignty; it is the theory of the abuse of sovereignty. Applied in the internal affairs of states, it would nullify the organization of justice, even as it would destroy it if admitted to international dealings. . . . This is why, gentle-

[1] M. Barbosa said that in Brazil, unlike the case in the United States, the government can be summoned to court and proceeded against.

men, we have not subscribed, and do not subscribe to this doctrine. In the juristic field, it seems to us seriously questionable. In the humanitarian field, it could not wholly exclude the sanction of force. In the political field, by making a high appeal to the Monroe Doctrine, it would compromise that doctrine; because, on the one hand, it would draw upon it the antipathy of the world, and, on the other, it would place upon it crushing responsibilities."

No one attempted to answer this reasoning of M. Barbosa concerning a state's bonded indebtedness; but Argentina and her adherents still insisted that the Porter Proposition should not apply to such indebtedness, and Dr. Drago, and M. Milovanovitch, of Servia, endeavored in the committee of examination to induce General Porter so to define "contractual debts" as to exclude the debts of a state itself. General Porter declared, however, that it was not within his competence to enter into definitions which it would be almost impossible to formulate, and the proposition was adopted with the much-disputed term undefined.

As an offset to Dr. Drago's contention that the Porter Proposition should be restricted, so as to exclude public debts from arbitration, M. Matte, of Chili, objected to the proposition because it was restricted only to disputes arising from contractual debts and did not include *all* kinds of pecuniary disputes. He referred to the Treaty of Mexico, which was signed January 30, 1902, by seventeen American states and provided for the submission to arbitration of "all claims for damages and interest of a pecuniary kind," and said that Chili's delegation would take one step farther and propose obligatory arbitration, not only for all claims for damages and interest of a pecuniary kind, but also for those which arise from pretended infractions of contracts. It was apparent that this step was too long for

the conference, — Chili's proposition was not discussed, and its delegation accepted the Porter Proposition as the utmost that could be gained.

The third objection stated by Dr. Drago, and supported by the representatives of Venzuela, Dominica, Nicaragua, Paraguay, Colombia, Bolivia, Sweden, Greece, and Servia, was that the Porter Proposition admitted the use of force after the failure of arbitration. Dr. Drago acquiesced in the use of force after the failure of arbitration in the case of ordinary contractual debts; but he opposed both "military aggression and the material occupation of American soil" under *any* circumstances in the case of public bonded indebtedness. His argument was:

"War is not justifiable in the absence of causes sufficient to endanger or to affect profoundly a nation's destiny, and among these causes can never be placed the nonpayment of bond coupons to their eventual holders. . . . By accepting that part of the proposition of the United States which makes appeal to force for the execution of disregarded arbitral sentences [in the case of bonded public debts], we should take a long step backward, we should recognize war as an ordinary resort of law, we should establish one more case of lawful warfare: a thing which would surely be a contradiction in a Peace Conference which has, as the very object of its existence, the prevention of the causes of war, or at least their diminution."

As to the use of war as a last resort in the case of ordinary contractual debts, Dr. Drago said:

"The denial of justice established by arbitration constitutes a common offense in international law, and must give occasion for reparation. A denial of justice, like an act of piracy, is a fact which destroys the equilibrium of the world community and endangers that community itself, and because of that very fact it falls within the immediate domain of the international repression which is foreseen, accepted, and made applicable by the general *consensus* of all nations."

But the other delegations which accepted Dr. Drago's argument against war as a last resort in the case of public bonded indebtedness did not indorse his admission of war as a last resort in the case of other contractual debts. M. Perez Triana, of Colombia, made the most extended and the most ardent address against the admission of war in any case of pecuniary dispute and under any circumstances.

"The collection of debts by force," he said, "necessarily interests the countries of Latin America whose territory is vast and the exploitation of whose natural wealth will continue to demand in the future, as it has done in the past, capital which must be sought for abroad and which will be secured in many cases either directly by the governments of the respective countries, or with their guarantee.

"The principle of collection by force can be applied only when the creditor is strong and the debtor is weak. When, as can very well be the case, a creditor is weak in military resources as compared with a great military power which can not pay its debts, the right of forcible collection would become ridiculous.

"In the case of debtor nations, it is possible that in spite of the greatest prudence, the government may find itself wholly unable to meet its financial obligations. This may arise from internal revolutions, from international wars, from the cataclysms of nature, which destroy in an incalculable manner the public revenues; it may arise from bad harvests during several successive years, or the sustained and ruinous fall in prices of national products. All this is of exceptional gravity in new countries which, unlike the old countries of Europe, do not possess the wealth accumulated for centuries.

". . . The state finding itself, then, in the situation described will be attacked by the naval and military forces of its creditor, and a war will commence in which the debtor state shall have been already condemned in advance before the conscience of the world, as the author of a war unjustifiable according to its own declaration.

". . . The decision rendered by the arbitral court can neither change the situation of the debtor country nor augment its resources. Yet, according to this decision, the debtor country, being unable to

pay its debts, must endure the armed aggression of the creditor, who can bombard its forts and invade its territory. And still the blows will not fall on the guilty or the responsible, but on innocent victims who must bear the burden of all the faults or errors of those who govern them. This indirect method of collecting debts partakes of the methods of the Inquisition; it is no more acceptable, morally, than the application of torment to wring confessions of guilt from innocent lips.

"I understand perfectly that these ideas are very different from those of creditors. But each one of us speaks here from his own point of view, and with his own arguments. The spirit of Shylock is still almost all powerful in our modern civilization. Once, the insolvent debtor could be sold as a slave or imprisoned at will. We have progressed a little; but Shylock will always continue to demand his pound of flesh and to take it whenever he can. It is his rôle. Now, as M. de Brunetière said, I do not accuse, I affirm. In the case of an individual creditor, the debtor can expect some distant ray of human charity. But the collective creditor is pitiless; the sentiment of humanity is lost in the collective soul, as smoke is in space: crowds, like water, seek and find their lowest level.

"If a man loses his wealth without having had it insured, by shipwreck, fire, or the failure of a corporation, he must be resigned; but here is a demand, on behalf of the creditor finding himself before a state which has no means of paying him, for a recourse to force which will increase with bloody violence the distress of the debtor state.

". . . The establishment of a recourse to force entails a new danger to the world's peace. Adventurous financiers in league with avaricious governments will constitute a dangerous household; the courtiers can say to their client, 'This claim is quite safe, we have the navy and army at our service for assuring its payment.'

"It is the appeal to force that we reject. You ask, 'What shall be done?' I reply, 'If you can not solve the problem satisfactorily and justly, let things take their course.' It must be remembered that nations are, so to speak, immortal, and that there is no limit of prescription for national debts: what one generation does not pay, is paid by the next. This Peace Conference, despite the good will of all its members and the undoubted ability of the illustrious men who

preside over its deliberations, can not work miracles; and it would be a miracle to insure international creditors against all possibilities of loss. And, I venture to say, it would not be a miracle, but a great error to place in the hands of financiers — some of whom are not angels — the means of promoting wars, more or less avowedly imperialistic in their tendencies, against weak nations. From such sparks may spring conflagrations of incalculable import.

"I must not conclude without adding that Colombia, my country, has a well-established credit, that its revenues are visibly increasing, and that Peace reigns over it without cloud or shadow."

M. Ruy Barbosa, who was the chief exponent of the opposition to the first part of the Drago Doctrine, attacked also both its second part and the Colombian extension of it.

"Our credit, always intact," he said, "is a structure carefully erected, and we do not wish to expose it to the attacks of malevolence which is as watchful in dealings between nations as in those between individuals. We were, we are debtors, and we may still need to have recourse to foreign markets [for our bonds]. We do not wish, then, to incur the suspicion of those whom we have so often found ready to coöperate in the development of our prosperity; for God has permitted us to remain unacquainted with usury, and never to meet with that ferocity of capital against which pretense of defense is made. Our creditors have been intelligent and reasonable co-workers in our progress.

". . . Our impression as to this matter is very vivid. We fancy that when one owes, and has the misfortune to be unable to repay, he may not simply discard his embarrassments with impunity. We believe that the danger and the fear of consequences may act, sometimes, as a healthy check upon imprudent borrowing.

". . . It has been thought that there is a kind of legalization of war in this measure proposed to the Peace Conference. But there is not the least legalization in it. It is the legal admission of a necessity which can not be destroyed. . . . The American formula, if it were less sincere, might be silent on the final use of force in cases of disregarded arbitration. But the difference then would be solely that

there would have to be read into the text what is now expressed in it. For it is quite obvious that, even though only the stipulation, pure and simple, of obligatory arbitration is expressed, as soon as this is evaded or its verdict is not respected, the hypothesis of the intervention of arms returns as the only possible corrective of the rejection of an arbitral agreement or of disobedience to its award. This is what the ordinary arbitral agreement passes over in silence, and what the American proposition affirms. The two things differ only in appearance; one is more clever, the other more frank.

"It is sad that we are obliged always to leave war behind what we do for peace. But so long as war exists and men make of it a means of reinstating law, we know not how to prevent the melancholy spectacle — of which we ourselves are necessarily parts — of considering it as the last court of appeal for those who, while believing themselves possessors of a law, or having an arbitral decision in their favor, see it flouted by those in rebellion against measures of conciliation and forms of justice. . . . Nothing could show us in a more impressive manner how our mission is circumscribed by the essence of facts and what a universe of impossibilities is opposed, outside of certain limits, to our most ardent wishes and our most heroic efforts."

M. Milovanovitch renewed in the committee of examination the effort to strike out the part of the proposition which refers to the use of armed force, at the same time admitting that a recourse to violent means must always be understood as a last resort. But General Porter replied that it was impossible to do this, and that from what he had heard from the jurisconsults, the substitution of the apparently milder, but more equivocal, words "coercive measures" would be defeated. Sir Edward Fry, of Great Britain, also said that the term "coercive measures" might be equivocal, since it is employed in domestic law to designate all the modes of execution in use for national sentences.

In the Porter Proposition as first presented, no reference was made to the use of force in case the debtor state makes "impossible the establishment of the compromise" (*i.e.*

an agreement as to the precise question to be arbitrated, the time, place, and mode of the arbitration, etc.). When it was presented to the subcommission without this proviso, Count Tornielli, of Italy, while expressing his strong desire to vote for the proposition, was opposed to it without such proviso. He evidently had in mind, in this case as well as in other cases of obligatory arbitration, the fear lest the United States Senate and other similar bodies might prevent the resort to arbitration even after the offer had been accepted. Count Tornielli also drew the inference from General Porter's speech that the United States was unwilling to arbitrate any claims for pecuniary damages in cases where the State courts had failed to award them to Italians injured in American cities. His objections to the proposition were supported by the representatives of Japan, Spain, Norway, Servia, Bulgaria, and Persia. But the proviso as to the compromise was included in the amended proposition, and General Porter stated in the committee of examination that "the purpose of the proposition is not, directly or by implication, to attempt to justify, in cases of debts or claims of any kind, any procedure which is not based on the principle of the settlement of international differences by arbitration, of which, in its widest application, the United States of America is to-day more than ever a sincere advocate." Thereupon Count Tornielli expressed himself as entirely satisfied, and withdrew his objections; and the other delegations, objecting on the same ground, followed his example.

On the other hand the representatives of the Dominican Republic and Haiti objected to the compromise clause being included in the paragraph recognizing force as the last resort, and based their objection on Article 53 of the

Convention of 1907 for the Peaceful Settlement of International Differences which provides that the Court of Arbitration shall determine the compromise in case the parties in dispute are agreed that it should do so. But this objection was yielded by Haiti, in order to secure the votes of the delegations making the directly opposite objection; while the Dominican Republic voted for the proposition with the reservation of this clause.

In reply to a probable objection of Professor de Martens, of Russia, General Porter stated in the committee that the application of the rule was intended to be restricted absolutely to the interventon of a *government* in behalf of its citizens, and not of the citizens themselves.

One final objection was urged against the proposition by the representatives of Roumania, Switzerland, and Turkey in regard to the place which it was to occupy among the acts of the conference. The representatives of France and Portugal welcomed the proposition for the expressed reason that it was a shining example of obligatory arbitration; the representatives of Germany and Austria, while supporting the proposition throughout, denied that they were thus advancing the cause of obligatory arbitration. And the delegations of Roumania, Switzerland, and Turkey opposed the proposition lest it should be placed in the Convention for the Peaceful Settlement of International Differences, in association with the articles referring to arbitration, and thus be made an example of obligatory arbitration. General Porter stated his entire willingness, from the first, however, that his proposition be made the subject of a separate convention, and this plan was adopted. This concession resulted in Turkey's voting for the proposition, and in abstention from the vote on the

part of Roumania and Switzerland, instead of their negative vote.

Although the Porter Proposition had to run this long gauntlet of objections, it was hailed and followed throughout by the applause of many of the delegations, including those of the large and the creditor powers; noteworthy among these were Great Britain, France, Germany, Russia, Austria, and Brazil. Even those who made objections to its form in the various ways noted above, had many and warm words of praise for its general principle; and in the end it received the affirmative vote of thirty-nine delegations, while those of Belgium, Roumania, Sweden, Switzerland, and Venezuela did not vote against it, but abstained from voting at all. It should be noted, however, that nine of the American republics, while casting an affirmative vote for the proposition as a whole, made certain reservations as to its interpretation or application. Eight of these, Argentina, Colombia, Ecuador, Guatemala, Nicaragua, Paraguay, Peru, and Uruguay, made the reservations included in the Drago Doctrine; and the Dominican Republic adhered to its reservation in regard to the compromise.

D. INTERNATIONAL COURTS

1. The Permanent Court of Arbitration

a. The Conference of 1899

The Russian plans for the peaceful settlement of international difficulties included proposals in regard to good offices and mediation, international commissions of inquiry, obligatory arbitration in certain classes of cases,

and a code of arbitral procedure; but they did not at first include a plan for a court of arbitration. The honor and credit of proposing this famous institution belong to Sir Julian Pauncefote, of Great Britain, who made the proposition at the second meeting of the III Commission, on the 26th of May. He presented his plan in the following short address:

"Permit me, Mr. President, to inquire if, before going farther into this matter, it would not be useful and suitable to sound the commission on the question which in my opinion is the most important of all, that is, the establishment of a permanent tribunal of international arbitration, on which you have touched in your discourse.

"Many codes of arbitration and rules of procedure have been drawn up, but the procedure has been regulated, up to the present, by the arbitrators or by general or special treaties. Now, it seems to me, that new codes and rules of arbitration, whatever their merit may be, do not much advance the great cause which has called us together.

"If it be desired to take a step in advance, I am of opinion that it is absolutely necessary to organize a permanent international tribunal which could assemble immediately on the request of the nations in dispute. This principle once established, I believe that we shall not have much difficulty in agreeing upon details. The necessity of such a tribunal and the advantages which it would offer, as well as the encouragement and even the strong impulse which it would give to the cause of arbitration, has been shown with as much eloquence as force and clearness by our distinguished colleague, M. Descamps, in his interesting 'Essay on Arbitration,' an extract from which is to be found among the 'Acts and Documents' so graciously supplied to the conference by the Netherlands government. Nothing more remains for me to say, then, upon this subject; and I shall much appreciate it, Mr. President if, before proceeding further, you would consent to draw out the thoughts and feelings of the commission on the proposition which I have the honor to submit to you regarding the establishment of a permanent tribunal of international arbitration."

The great idea contained in this short and simple speech, like many another great idea in the world's history, did not meet with an immediate and visible response. In fact, it met first with an objection, on the part of two members, that it should not be allowed to displace the regular order of business! But before the end of the meeting, M. de Staal announced that the Russian delegation also had a proposition to present concerning a court of arbitration; and both the British and Russian plans were referred to the committee of examination.[1]

At the third meeting of the committee, May 31, Mr. Holls presented, on behalf of the United States delegation, a plan for a permanent tribunal of arbitration; but both he and M. de Staal agreed that Sir Julian Pauncefote's plan should be taken as the basis of the committee's discussion. This discussion occupied seven meetings, held at intervals from the 9th of June to the 18th of July; and these five weeks were devoted, not only to discussion within the committee, but also to consultations on the part of members of the whole conference with each other and with their respective governments, and to one important diplomatic mission in behalf of the proposed tribunal.

The preliminary discussion of the question was opened by M. Bourgeois, of France, with the statement that his delegation would gladly accept the proposition for a permanent tribunal, on the twofold guarantee, first, that there

[1] This very important committee was composed of the following members: Messrs. Asser of the Netherlands, Descamps of Belgium, D'Estournelles of France, Holls of the United States, Lammasch of Austria, De Martens of Russia, Odier of Switzerland, and Zorn of Germany; M. Bourgeois of France presided over the committee; Count Nigra of Italy and Sir Julian Pauncefote of Great Britain were regular and active attendants on its meetings, and various other delegates were sometimes present.

should be entire liberty in having recourse to the tribunal proposed, or to any other method of arbitration; and, second, that there should be entire liberty of choice among the members of the court to act as arbitrators in any given case. Sir Julian Pauncefote followed this statement with an expression of appreciation for the consideration shown to the British plan and for the Russian and American amendments to it. Chevalier Descamps, of Belgium, then said of the importance of the proposed tribunal, and the demand for it, that it " responds to the juristic conscience of civilized peoples, to the progress achieved in national life, to the modern development of international litigation, and to the need which compels states in our days to seek a more accessible justice in a less precarious peace. It can be a powerful instrument in strengthening devotion to law throughout the world. And it is a fact of capital importance that three projects of this kind have been presented by three great powers. . . . The difficulties which the realization of the magnanimous views of the Emperor of Russia has encountered in other fields are another reason for us to urge forward the organization of mediation and arbitration. We must develop and consolidate the organic institutions of peace. There is on this point a general expectancy in every land, and the conference can not, without serious disadvantages, disappoint it. The proportions which we shall give to the work that we are about to undertake will be, without doubt, modest; but the future will develop whatever fertility this work has for the welfare of the nations and for the progress of humanity. As for the delegates to this conference it will be, without doubt, one of the greatest joys of their lives to have coöperated in

the achievement of this great result, — the fraternal approach of the nations and the stability of general peace."

Dr. Zorn, of Germany, then took the floor and said that he had listened with the greatest attention and with a profound emotion to the above declarations, and that he had recognized the solemnity of that hour when the representatives of the civilized states had spoken on one of the gravest problems which could be discussed. "For my part," he said, "I hope that the day will come when the noble desire of the Emperor of Russia can be wholly fulfilled, and when differences between nations shall be brought, for the most part, in so far as they concern neither vital interests nor national honor, before a permanent international tribunal. But, filled though I am, personally, with this hope, I can not, I must not, surrender myself to illusions; and such is, I am sure, the opinion of my government also. . . . The German government can not pronounce upon the organization of a *permanent* tribunal, before having had satisfactory experience with an *occasional* court of arbitration." He thereupon moved the previous question, which was the Russian proposition as to arbitral procedure.

To remove this fatal objection on the threshold of the discussion of a permanent tribunal, M. Asser, of the Netherlands, endeavored to convince Dr. Zorn that the necessary experiments in occasional arbitration had been satisfactorily made, and that those which yet remained to be tried were precisely those which the proposed plan had in view, and which could be tried in no other way. But Dr. Zorn adhered to his motion, for the reasons that a permanent tribunal had not figured in the original Russian programme submitted to the powers, and that "in reality,

it is quite probable that the permanent *temporary* tribunal, as it has been called, will not be long in becoming altogether permanent." The veteran diplomacy of Count Nigra, of Italy, was then brought into play, and he made a direct appeal to his German colleague not to make "too absolute a decision on a question which interests so deeply all mankind. The impatience," he continued, "with which public opinion awaits the results of our labors has become so great that it would be dangerous to renounce the acceptance of an arbitral tribunal. If the conference should respond to that impatience with a *non possumus*, or insufficient results, the disappointment would be bitter. The conference would incur, in such case, a grave responsibility towards history, towards the world, and towards the Emperor of Russia." Chevalier Descamps added his persuasion to Count Nigra's, and Dr. Zorn consented to withhold a categorical refusal for a time, and to refer the question to his government.

This first danger temporarily avoided, Professor de Martens, of Russia, ontinued the general discussion of the plan, and said that the establishment of a permanent tribunal was only the natural development of Russia's proposals as to arbitration and arbitral procedure. M. Odier, of Switzerland, representing the smaller powers, said:

"More than one hope, more than one expectation, of arbitration has dawned on the world; and popular opinion has the conviction that in this direction, above all, important steps will be taken by the conference. No one can deny, in fact, that we are able at this moment to take a new and decisive step in the path of progress. Shall we draw back, or reduce to insignificant proportions the importance of the innovation expected of us? If so, we should arouse a universal disappointment, the responsibility for which would press heavily upon us and our governments."

Professor Lammasch, of Austria, next expressed his delegation's willingness to examine the Pauncefote plan, but its determination, at the same time, to give neither direct nor implied indorsement of it.

Finally, Mr. Holls closed the discussion by the following heartily applauded address:

"I have listened with the greatest attention to the important exchange of opinion which has just taken place between the representatives of different great European states. It has seemed proper to me, representing, as it were, a new power, that precedence in the discussion should naturally be given to the delegates of the older countries. This is the first occasion upon which the United States of America takes part under circumstances so momentous in the deliberations of the states of Europe, and having heard, with profound interest, the views of the great European powers, I consider it my duty to my government, as well as to the committee, to express upon this important subject the views of the government of the United States with the utmost frankness. I join most sincerely and cordially in the requests which have been addressed to the honorable delegate of the German Empire.

"In no part of the world has public opinion so clearly and unmistakably expressed its adherence to the noble sentiments of His Majesty the Emperor of Russia, which have led to the calling of this conference, as in America, both North and South. Nowhere do more sincere wishes, hopes, and prayers ascend to heaven for the success of this conference. The delegation of the United States of America has received hundreds of expressions of sympathy and support, not only from the United States, but from the entire American continent; and these manifestations come, not only from individuals, but from secular organizations of the highest standing and the widest influence, and from great and powerful churches — some of them representing millions of members. In consequence, we, the members of this conference, are bound, so to speak, by a most solemn moral obligation, incurred, not between the governments, but between the peoples of the civilized world. As it was most fittingly expressed in a great national crisis of my own country by its greatest modern states-

man, Abraham Lincoln, 'We can not escape history.' We, of this conference and of this committee, will be remembered in spite of ourselves — no personal significance or insignificance can spare one or another of us.

"Let me ask the honorable members of this committee to approach the question before us in a practical spirit, such as is generally attributed to us Americans; let us observe the true state of public opinion. Public opinion, all over the world, is not only eagerly hoping for our success, but it should be added that it has become uneasy and anxious about it. The powers of unrest and discord are even now exulting over what they hope will prove to be our ignominious failure.

"On the other hand, the fear is abroad, most unmistakably, even among our friends and well-wishers, that by reason of conflicting interests of a political nature, or for other causes which can not be discussed openly, the results of this conference may turn out to be purely platonic, inadequate, unsatisfactory, perhaps even farcical; and, moreover, it should be clearly recognized and remembered that public anxiety on this point is based upon recent experience in a case presenting many analogies to the situation before us. A conference was called not many years ago upon the noble and generous initiative of His Majesty the German Emperor, upon a subject profoundly interesting to mankind; namely, the protection of the interests of labor; and it met at Berlin, having a most distinguished and representative membership. But what was the result? Resolutions of a purely academic character were adopted, and that conference is even now almost forgotten.

"Civilized, educated, progressive public opinion, which is beyond all question the most potent and the one irresistible moral influence in the world to-day, remembering former failures, will not pardon us if we offer it a new acute rebuff, and the very hopes which are now concentrated upon us and our work will be the measure of the disappointment which would follow our failure. Moreover, the establishment of a permanent international court is the one great success which is hoped for, not only as being brilliant and striking, but also as being attainable, — in fact, within our very grasp. Without doubt the honorable delegate from the German Empire is correct, when he regards even the Russian project [of mediation and arbitral procedure] as a decided step in advance over the present condition of affairs

as regards arbitration; but from the point of view of the practical man — the point of view of efficient and critical public opinion all over the world — I venture to say most emphatically that we shall have done nothing whatever if we separate without having established a permanent tribunal of arbitration." [1]

Under the stimulus of these earnest preliminary addresses, the committee took up the discussion of the articles proposed for the establishment of the tribunal, with those of Sir Julian Pauncefote as a basis.

The name given to the new institution was the Permanent Court of Arbitration, and the first article [2] concerning it contained the following statement: With the object of facilitating an immediate recourse to arbitration for international differences which have failed to be settled by diplomatic methods, the Signatory Powers agree to organize a Permanent Court of Arbitration, accessible at all times and acting, unless otherwise stipulated by the parties, in accordance with the rules of procedure included in the present convention.

The only debated point in this article was the name given to the new institution. Sir Julian Pauncefote proposed the name of Permanent *Tribunal* of Arbitration; this seemed rather strong, and the committee at first adopted the word *Institution;* but as the work grew beneath their hands, they frankly changed it for *Court.* Dr. Zorn objected to both *Tribunal* and *Court* as giving rise to illusions or misunderstandings; and since, as he remarked, "there exists only a list, whose members enter on their function

[1] This translation is taken from Mr. Holls's own book on the first conference. There is an excellent summary of the address, in French, in the Proceedings of the Conference, Part VI, pages 20–21.

[2] This is Article 20, in Chapter II, Title IV, of the Convention for the Peaceful Settlement of International Differences.

only after having been chosen for a specific case," he suggested the name of Permanent *List of Arbitrators*. Other members of the committee defended the word Court, Mr. Holls saying that it is used in the same sense for the Supreme Court of New York, whose judges, elected by different districts, have never been all assembled at once; and Professor de Martens saying that the term adopted corresponds with the usage in France, England, and the United States.

The competence of the court was stated as follows: The Permanent Court shall be competent for all cases of arbitration, unless there shall be an agreement between the parties for the establishment of a special tribunal. Count Macedo, of Portugal, desirous of emphasizing the fact that the court was intended to be the regular organ of arbitration, and tribunals specially established for individual cases only the exception to the rule, proposed an amendment to that effect. But the amendment was rejected for the express reason that the article as it stood emphasized the regular character of the court. The committee was unanimous in hoping that the nations would recognize the *regularity* of the court established at The Hague and grow more and more in the habit of resorting to *it*, but feared to appear to exert any pressure upon them to select it. The competence of the court for any case of arbitration, whether voluntary or obligatory, and the liberty left to the powers to select it or some other tribunal, were believed to justify the proud term applied to it, "A free tribunal in the midst of independent states."

In order that the court should be something more than a list of judges scattered in different lands, and be ready for immediate operation when called upon, the British

plan proposed the establishment of a bureau, with a local habitation, a secretary, and other officials, and with definite tasks to perform. It left the place of its establishment undetermined; but the committee agreed unanimously upon The Hague as its seat, and M. Asser, on behalf of the Netherlands government, expressed appreciation of the honor thus conferred. It was decided not to provide for a secretary or other officials of the International Bureau, but to leave this to a council, provided for later; but Dr. Zorn insisted that whatever name should be given to the head of the bureau, he should remain a *secretary* in fact, and not become "a center of international government, a kind of cosmopolitan administrator." The duties assigned to the bureau are: to serve as the record office of the court; to be the medium of all communications relating to the meetings of the court; to have custody of the court's archives and take charge of all its administrative affairs. The signatory powers, on their part, agreed to furnish the bureau with a certified copy of every treaty of arbitration made by them, of every arbitral award concerning them rendered by special tribunals, and of the laws, rules, and documents declaring the final execution of the judgments rendered by the court. By these provisions it was intended to make The Hague a rich center of the most important and useful documents relating to arbitration tribunals, both general and special. Mr. Holls proposed a rule providing for the publication of this material; but it was deemed better to leave this matter in the hands of the council and the states concerned. M. Bourgeois said, in accepting the proposed bureau, that he believed it would not only perform the useful tasks directly assigned to it, but would be a visible and respected sign constantly recalling to the minds of all

peoples the noble conception of international law and peace.

For the purpose of increasing the prestige of the International Bureau, of keeping the powers in close touch with it and the court, and thus of promoting a resort to arbitration, it was agreed that a Permanent Administrative Council should be constituted at The Hague as soon as possible after the ratification of the convention by at least nine powers. This council is composed of the diplomatic representatives of the signatory powers accredited to The Hague, with the Netherlands minister of foreign affairs acting as its president. It was at first proposed that the members of this council should be only the diplomatic representatives *resident in* The Hague; but Baron de Bildt, of Sweden and Norway, objected that this would exclude ministers who, like Sweden and Norway's, are *accredited to* The Hague, but who reside elsewhere, — at Brussels or Paris, for example. It was therefore agreed to substitute *accredited to* for *resident in* The Hague; but it was also voted that the diplomats referred to should have all their communications, as members of the council, addressed to some place in The Hague.

The duties assigned to the Permanent Administrative Council are: to establish, organize, and supervise the International Bureau, with entire control over the appointment, suspension, or dismissal of its officials and employees, over their allowances and salaries, and over the general expenditure; to notify the powers of the constitution of the Permanent Court and to provide for its installation; and to decide all questions of administration which may arise in connection with the operations of the court. It was given the right to make its own by-laws and all other

necessary regulations; but it was provided that at meetings duly summoned five members shall constitute a quorum, and that all decisions shall be made by a majority of votes. Count Welsersheimb, of Austria, objected to the council that it was given a liberty of action equivalent to a kind of sovereignty, and proposed that its decisions should be submitted to the various governments for ratification before their execution; but the reply was made to this objection and proposal that the duties of the council were purely administrative and not at all political or judicial, and that the necessity of awaiting governmental ratification would greatly hinder the council's work. It was agreed, however, that the council should communicate, without delay, to each signatory power the by-laws and regulations adopted by it, and shall address to them annually a report of the proceedings of the court, of the administration of the council and bureau, and of the bureau's expenses. It was further provided that the expenses of the bureau shall be borne by the signatory powers in the proportion established for the International Bureau of the Universal Postal Union.[1] The expenses of each case of arbitration will be spoken of later.[2]

The important question of the appointment of judges for the new court was settled with but relatively little discussion. Sir Julian Pauncefote proposed that each signatory power should appoint two judges; but Dr. Zorn advocated the increase of this number to a maximum of four, for the reason that it would enable a country — especially a large country — to select men from the ranks of

[1] The members of this Union are grouped in classes according to their size and presumptive wealth, and the members of each class bear an equal share of the expenses apportioned to that class.

[2] Under Arbitral Procedure, page 402.

diplomacy and the army or navy as well as jurisconsults. Several delegations were strongly opposed to this increase, for the reason that it would decrease the moral authority of the court. But the German delegation insisted on the increase, and the larger number was adopted in the spirit of conciliation, and with the consoling reflection that a larger number of judges might be calculated to keep the court more in the public mind.

The United States delegation urged the selection of judges by the highest judicial body in each country, in order that their appointment might be removed from political influence and intrigue; but the other delegations were opposed to this, partly because of the uncertainty as to the highest judicial body in some countries in Europe, and partly because they were opposed to investing their judiciary with any appointive power. The rule as adopted merely provides that "each signatory power shall select not more than four persons"; but in order to secure the impartiality of their appointment so greatly desired by the American delegation, it adds the words "of recognized competence in questions of international law, enjoying the highest moral reputation, and disposed to accept the duties of arbitrators."

The bureau is to communicate the list of judges thus selected, and any changes in it, to the signatory powers. Liberty is accorded to two or more powers to unite in the selection of one or more members of the court; and the same person may be selected by different powers. The term of the judges is limited to six years, but their appointment may be renewed. In case of the death or resignation of a member of the court, his place shall be filled in accordance with the method of his appointment.

For the formation of the arbitral tribunal, for the arbitration of specific cases, it was readily agreed that each party to the dispute should choose two arbitrators from the list of members of the Permanent Court; but the question of how the umpire, or sur-arbiter, should be chosen was one of considerable difficulty. One suggestion was that the umpire should be chosen from the list of judges by lot; but this was opposed on the ground that the lot might fall upon some one unsatisfactory to the parties. Professor Lammasch then proposed that the choice of the umpire should be left to the neutralized powers, Belgium, Switzerland, and Luxemburg; but Mr. Holls objected to this as being too exclusively European. It was finally agreed that the plan adopted for commissioners of inquiry should be adopted for the arbitration tribunal as well. That is, that the arbitrators chosen by the parties shall choose the umpire; if they can reach no agreement, the choice shall be left to a third power selected by the parties; if the parties can not agree on the third power, each one shall select a power, and the powers so selected shall choose the umpire. Baron de Bildt, of Sweden and Norway, advocated the amendment that the parties to the dispute should be given the right of confirming or rejecting the umpire; but as indefinite rejection might prevent arbitration, and confirmation of the umpire might detract from his absolute impartiality, this amendment was not adopted. The great desirability of all the parties to the dispute being satisfied with the umpire was strongly emphasized in the discussion, however, and it was generally considered that the two arbitrators selected by each party should be regarded as the agents of the parties they represented in the choice of the umpire, and thus enable the par-

ties to exercise an influence in that choice. But the fact was also emphasized that from the moment the arbitration begins, all the arbitrators should cease to be agents, and should act only as impartial judges.

It should be noted that the parties in dispute are left at liberty to agree upon any other method than the above of selecting the members of the arbitral tribunal; but if they adopt this method, the arbitrators selected must all be members of the Permanent Court. The British plan permitted the selection of other arbitrators than those on the list; but this was considered to be derogatory to the prestige of the court. As another means of preserving or increasing the court's prestige, it was agreed that the members of the court, while in the discharge of their duties, and outside of their own country, shall enjoy diplomatic privileges and immunities.

The tribunal of arbitration being constituted, the parties must communicate the fact to the bureau, which shall make arrangements for the meeting of the tribunal at a time agreed upon by the parties. Its usual place of meeting shall be at The Hague; and, except in cases of necessity, the place of its meeting shall be changed by the tribunal only with the assent of the parties.

Sir Julian Pauncefote, with the desire of having the court "utilized to the utmost possible extent," proposed an article providing that the International Bureau at The Hague be authorized to put its offices and its staff at the disposal of the signatory powers for the performance of the duties of any special tribunal of arbitration. Professor de Martens supported this proposition in the hope that "The Hague may become the center of international arbitrations, and the habit be contracted of taking the road to the Perma-

nent Court." This proposition was unanimously adopted, as was also the further provision, moved by Sir Julian Pauncefote and supported by Professor Renault, of France, that the jurisdiction of the Permanent Court may be extended, under conditions prescribed by its rules, to controversies existing between nonsignatory powers, or between signatory powers and nonsignatory powers, if the parties agree to submit to its jurisdiction. It will be observed that this article does not extend to nonsignatory powers the invitation to make use of the International Bureau for special tribunals of arbitration, but only for the jurisdiction of the Permanent Court. As an additional encouragement to nonsignatory powers to make use of the Permanent Court, the proposition to have the council decide on the fees to be charged them for the use of the International Bureau was rejected, and Count Nigra's suggestion was adopted, in accordance with which nonsignatory powers may utilize the bureau without money and without price.

Sir Julian Pauncefote also desired to extend the facilities of the International Bureau to international commissions of inquiry, but withdrew his motion to that effect in face of the opposition of Professor Zorn, of Germany.

It has been seen that in the preliminary discussion which preceded the committee's first reading of the Pauncefote Plan for an arbitral court, Germany's anxiety in regard to it threatened to place an insuperable obstacle upon its very threshold, but that Professor Zorn's instructed opposition was temporarily postponed until he could have an opportunity of going to Berlin to consult with the German government in regard to the details of the plan. After the first reading of the plan, the committee adjourned for nine days to afford this opportunity; and to assist Professor

Zorn in his important mission, Count Münster and Ambassador White, first delegates of Germany and the United States, respectively, suggested that Mr. Holls should go with him. This suggestion was cordially approved by the rest of the committee, and Mr. Holls gladly consented. His article in regard to special mediation had been peculiarly acceptable to German ideals, and his course during the debate and his genial personality had helped to make him *persona grata* at the German capital. The two messengers carefully explained the details of the plan to Prince von Hohenlohe, the chancellor, and Count von Bülow, the minister of foreign affairs, who, after communication with the Emperor, absent at Kiel, gave Germany's consent to the general plan, with some special instructions as to details. Accordingly, when the committee took up the second reading of the articles, Professor Zorn was able to report, much to his own and the committee's gratification, that his government "has accepted the principle of this innovation in the form suggested by Sir Julian Pauncefote, and solely by reason of the latitude which it leaves to the governments to select their arbitrators from a list." He stated also that his government "recognizes the importance and grandeur of this new institution."

b. The Conference of 1907

The Conference of 1907 agreed unanimously to maintain the Permanent Court of Arbitration, "such as it was established by the first Peace Conference." The effort to supplement it by another court will be described later; but a few changes in regard to it will be noted here.

Dr. Kriege, of Germany, referred to the desirability of

having the powers send *promptly* to the International Bureau reports of the special arbitrations and treaties entered into by them, and proposed to add to the agreement to that effect the words "as soon as possible." This proposition was adopted. M. Fromageot, of France, proposed also that the bureau be authorized to send out, periodically, a circular letter to all the powers to remind them of this agreement; but Dr. Kriege objected to giving the bureau "the right of reminding the powers of their duty," and this proposition was rejected.

The filling of vacancies in the court gave rise to the question whether the vacancy should be filled by the selection of a new member to serve for the remainder of the former member's term, or for a new period of six years. The latter solution of the question was adopted.

The choice of arbitrators from among the members of the Permanent Court, to constitute the arbitral tribunal, was the subject of two amendments. It was decided, first, that only one of the two arbitrators selected by each party to the dispute may be a citizen of the country which selects him or among the members of the court appointed by it. This decision was in line with the suggestion made by the United States delegation in 1899, when Mr. Holls moved that in cases where the tribunal consisted of no more than three members, none of them should be citizens of the countries in dispute. He based his motion on the argument that when two of the three arbitrators were citizens of the two countries in dispute, there would be only one genuine and impartial judge. His motion was defeated, however, on the ground that, while it is an axiom of civil law that no one can be a judge of his own cause, in international law sovereign and independent states would not

abdicate their sovereign claim to be represented on the tribunal trying their cause. The system of having two arbitrators appointed by each of the parties was adopted then, as an intermediate step between diplomatic negotiations and judicial procedure. In 1907 one step further was taken by providing that only one of the five possible arbitrators should be a citizen of each of the countries at variance.

The second amendment to the method of choosing arbitrators had to do with the choice of the umpire, or sur-arbiter. The plan adopted in 1899 did not provide for the case where the neutral powers, selected by the parties in dispute to choose the umpire, can not agree on a choice. This omission was filled in 1907 by the provision that if, after a delay of two months, the neutral powers have been unable to agree, each of them shall present two candidates from the list of members of the Permanent Court, — the said candidates not to be the same as either of those chosen by the countries at variance, or citizens of them; it shall then be determined by lot which of the candidates thus presented shall be the umpire. This resort to lot was proposed by the German delegation, and was adopted in default of a better one, although Professor Lammasch, of Austria, objected to it for the reason that, even if so haphazard a method may be necessary in affairs which require speedy solution, it would be very dangerous when applied to an arbitral tribunal, as it would greatly diminish the confidence which should be perfect in such a tribunal. The method of taking the lot is left to the parties in dispute, and may be left by them to the International Bureau.

Professor de Martens, of Russia, reported that at the

time of the Venezuela Arbitration, the arbitrators arrived at The Hague and found nothing arranged for the work of the tribunal, which had no resources of its own, — not even a cent for the purchase of paper! The conference therefore adopted a rule requiring the International Bureau to make all necessary arrangements for the installation of tribunals. Diplomatic privileges and immunities were restricted to "members of a tribunal in the exercise of their functions and outside of their own country."

It is stated in an earlier article that the Permanent Court will have its seat at The Hague, and it is therefore taken for granted that the tribunals will hold their sessions at The Hague. The former rule as to this point (Article 25) was accordingly omitted.[1]

In view of the fact that a number of states had adhered to the convention since 1899, it was proposed that such states should be charged with their proportion of the expenses of the International Bureau from the date of its establishment; but this was rejected and the more liberal rule adopted that states adhering to the convention shall pay their portion of the said expenses from the date of their adherence.

2. Arbitral Procedure

a. The Conference of 1899

The Russian delegation presented, together with its plans for mediation and arbitration, a code of rules for arbitral procedure. They were intended to be used in all

[1] A later article, under Arbitral Procedure, deals with this point; see page 394.

cases of special arbitration, for which the parties to the arbitration did not themselves provide a code; but after the institution of the Permanent Court of Arbitration, on the initiative of the British delegation, they were adopted especially with a view to application by that court. They were based on the rules of procedure adopted by the tribunal which arbitrated the question of the boundary line between Venezuela and Great Britain, and the latter were drawn up by Professor de Martens, of Russia, who was president of that tribunal, Justice Brewer, of the United States Supreme Court, and Lord Justice Collins, of the British High Court of Judicature.

The code adopted by the conference comprised twenty-eight article (Nos. 30 to 57 of the Convention for the Peaceful Settlement of International Differences), and were introduced by the general statement that, with the object of encouraging the development of arbitration, the signatory powers have adopted the following rules, which shall be applicable to arbitral procedure, unless the parties themselves shall agree upon other rules. It was recognized as a matter of course that each special treaty of arbitration may provide the rules of procedure in the arbitration agreed upon; but it was recognized as a matter of fact that negotiations for agreement upon the necessary rules had been a fruitful source of delay, uncertainty, and embarrassment, and a menace to the successful result of various arbitral tribunals. The increasing number of arbitrations, on the other hand, had developed a wide and undesirable diversity of practice; for the code of 1899 was the first successful attempt to procure international sanction of even the most fundamental rules of procedure. While providing these fundamental rules, the conference

sought to avoid the other extreme of adopting rules so detailed and inelastic that they would in their turn prove an embarrassment and a danger.

The sovereignty of states is recognized both in the voluntary character of the recourse to arbitration and in the rule concerning the agreement, or *compromise*, providing for it. The rule prescribes that the powers which resort to arbitration shall sign a special act (*compromis*), in which the question in litigation shall be precisely defined, as well as the extent of the powers of the arbitrators; but it also prescribes that the making of the compromise shall imply an agreement by each party to submit in good faith to the award.

The terms of the compromise, as well as citations from other treaties, and from international law, which are quoted in regard to the jurisdiction of the tribunal of arbitrators, shall be interpreted by the tribunal itself. M. Asser, of the Netherlands, desired that the powers of the arbitrators might be given an even greater extension than this. For example, in the arbitration between Holland and France relating to the boundaries of Guiana, the question arose whether the arbitrator, the Emperor of Russia, would be required to decide upon the Dutch line or the French line, or whether he could award still another line; the Emperor demanded, and received from the parties, the right to give an unrestricted award. While the conference admitted the force of the argument thus illustrated, it decided that the compromise and not the general convention should foresee and provide for such contingencies. On the other hand, the right of the tribunal to interpret its own powers was regarded as necessary to enable arbitration to take place at all; while the sovereignty of states was

deemed to be sufficiently safeguarded by their entire liberty in the making of the compromise.

The tribunal is also given the right of determining such administrative details of the arbitration as the manner and time in which each party must conclude its argument, and the regulations for the admission of evidence.[1]

The constitution of the tribunal was carefully provided for. It may consist of one arbitrator, or of more than one, and may be selected or not from the Permanent Court, as the parties to the dispute may decide. If the parties fail to agree on its constitution, it shall be formed as follows: Each party shall appoint two arbitrators, and these shall together choose an umpire, or sur-arbiter; in case of an equal division of votes, the choice of the umpire shall be intrusted to a third power, agreed upon by the parties; if a third power can not be agreed upon, each party shall select a different power, and the choice of the umpire shall be made by agreement between the powers thus selected. The umpire is to preside over the tribunal; and if the parties constitute a tribunal without an umpire, then the tribunal shall elect its own presiding officer. M. Papiniu, of Roumania, desired some rule adopted which should regulate the case where the parties constitute a tribunal without an umpire and with an even number of arbitrators; for under such conditions, he said, an award might be impossible. The conference declined, however, to make provision for such an abnormal case, and contented itself with a warning against it.[2]

[1] When a sovereign, or executive head of a state, is selected as arbitrator, the conference recognizes his right, "for reasons of high consideration," to determine the arbitral procedure to be followed.

[2] An even number of arbitrators was provided for in the proposed treaty of arbitration between the United States and Great Britain.

In case of the death, resignation, or absence, for any cause, of one of the arbitrators, his place is to be filled in the manner provided for his appointment. This rule was substituted, after a long discussion, for the Russian proposition, which, in case of the death, resignation, or absence of one of the arbitrators, made the compromise null and void, and required the arbitration and agreement for it to be taken up anew.

Professor de Martens and Mr. Holls supported the Russian proposition, for the reason that arbitration is above all a question of personal confidence in the arbitrators; it is by virtue of this personal confidence that the arbitral tribunal is constituted and forms a veritable organism; and the personality of the arbitrators constitutes one of the chief guarantees of the tribunal's impartiality. The reply was made to this argument that it might perhaps apply to a sur-arbiter, but not to the other arbiters; that the government which has confided in one arbitrator may also confide in another chosen by it; that, very often, arbitrators are old men and may die before the end of a long arbitration, and in such case the fruit of long labor should not be lost simply because of the death or removal of one man; and that, in general, a rule should be favorable to the success of arbitration. This reasoning secured a majority vote, though a small one, for the rule as stated above. It was recognized, of course, that states could make a specific, and different, agreement in regard to this matter.

In case the parties do not agree on the place where the tribunal is to sit, The Hague is designated; and it is provided that the place of session shall not, except in case of overwhelming necessity, be changed by the tribunal with-

out the consent of the parties. The tribunal is given the right to decide on the languages[1] to be used by itself, or authorized to be used before it.

The desirability of having the parties to a dispute represented by agents, and their rights and interests defended by counselors or solicitors, before the tribunal, is recognized, and their appointment is vested in the parties themselves. The only question raised in regard to this rule was that of Mr. Low, of the United States, who inquired as to the desirability of permitting members of the Permanent Court, who are not selected as members of special tribunals, to serve as agents, counselors, or advocates before the tribunals. This question was made the subject of a long discussion, in the course of which the United States delegation proposed that no member of the court, during the term of his appointment, should act as agent, counselor, or advocate for any government except his own or the one which appointed him a member of the court. In presenting this proposition, Mr. Holls said that his delegation would have preferred the more stringent English rule of "once a judge, always a judge"; but since the term of the members of the court is only six years, and since it is desirable not to restrict unduly the liberty of states in appointing their representatives, the delegation had proposed the less strict rule. The argument for this rule was that, since the judges are recommended by one government to *all* the other governments, it is in the interests of all that they should be not only independent and impartial, but above suspicion. There was general agreement that no member

[1] The rule of 1899 used the word *languages;* but as the tribunal itself uses only one language officially, the word *language* was substituted in 1907, although the use of more than one language *before* the tribunal is authorized.

of the court, during the exercise of his functions as member of the arbitral tribunal, should accept an appointment as agent or advocate before another arbitral tribunal. But even this opinion was not embodied in a rule, and the American proposition also was rejected, for the reasons that every disqualification would restrict the liberty of appointment by the states; that the matter could safely be left to the good sense of the states themselves, their bench, and bar; and that, probably, experience would evolve the proper rule.

Ten articles were devoted to rules of procedure before the arbitral tribunal itself. They provided that the procedure shall comprise, as a general rule, two distinct phases: preliminary examination and discussion. *Preliminary examination* is stated to mean the communication, by the agents of the parties, to the members of the tribunal and to the opposing party, of all printed or written acts, and of all documents containing the arguments to be invoked in the case; while *discussion* is defined as the oral development of these arguments before the tribunal.

Every document produced by one party must be communicated to the other party; the tribunal decides upon the method and time of such communications, and when the preliminary examination is concluded, it may refuse to admit any new acts or documents which one party may desire to submit to it, if the other party objects to such admission; and the tribunal may also require from the agents of the parties the production of all papers and demand all necessary explanations, and in case of the agents' refusal the tribunal shall take note of the fact.

The discussions, under the direction of the president, shall be public only in case it shall be so decided by the

tribunal, with the assent of the parties. They shall be recorded in the official minutes drawn up by the secretaries appointed by the president. The agents and counsel of the parties are authorized to present orally to the tribunal all the arguments which they may deem to be expedient in support of their cause, and to raise objections or make incidental motions. The tribunal shall decide on these objections or motions, and its decisions shall be final and not subject to any subsequent discussion. The members of the tribunal are given the right to question the agents or counsel of the parties, and to demand explanations on doubtful points; but neither the questions nor the incidental remarks of the members of the tribunal are to be regarded as an expression of opinion by the tribunal in general, or by its members in particular. When the agents and counsel have presented all the arguments and evidence in support of their case, the president shall declare the hearing closed.

The procedure described above is the form familiar in American and British courts, and needs no special comment here. The only feature of it which received special comment in the conference was the rule authorizing the members of the tribunal to demand documents and explanations of the agents or counsel. While there was a general agreement that a state, through its representatives, can not be *compelled* to produce documents and answer questions, it was also unanimously agreed that the tribunal should be given the right to demand them and to *take note* (*prendre acte*) of their refusal; and, of course, such refusal may influence the award rendered.

Three articles prescribe the following rules in regard to the award: the tribunal's deliberations shall take place

behind closed doors; every decision shall be made by a majority vote, and the refusal of any member to vote shall be noted in the official minutes; the award shall be made by a majority of votes, and shall be accompanied by a statement of the reasons upon which it is based; it must be drawn up in writing and signed by each member of the tribunal; the minority members may, in signing it, state their dissent; it shall be read in a public sitting of the tribunal, the agents and counsel of the litigants being present or having been duly summoned.

The rule that the award shall be accompanied by a statement of the reasons upon which it is based was opposed by Professor de Martens, who argued that while the arbitrators might recognize the fact that their governments were in the wrong and would *vote* for an adverse award, they would not do so if obliged to sign a statement criticising their governments' policies and measures; and that a full and impartial arbitration would thus be prevented.[1] To this argument it was replied that a statement of the reasons for the award constitute a fundamental guarantee of its justice; that some questions can not be answered by a simple yes or no; that the tribunal may adopt any form and scope of such statement that it may deem advisable; that arbitral awards should be judicial sentences, and these are unimaginable without a statement of reasons; that the force of an award resides rather in its reasons than in the decision itself; and that it would be impossible to found a complete international jurisprudence upon arbitral sentences alone, without the reasons supporting them.

[1] Professor de Martens cited the Alabama and Behring Fisheries arbitrations as cases in which arbitrators refused to sign the award because of the statement of reasons on which it was based.

Another proposed amendment to the above rule was that the reasons for the vote of the minority should also be stated, and this not only in justice to, or as a check upon, the minority, but because their reasons would inevitably be published, either in their reports to their governments or in the press, and thus the disagreement between the judges would be greatly accentuated. But this amendment was rejected on the ground that it would imply *two* awards in each case, and that it would oblige the tribunal itself to accentuate in the public mind its difference of opinion.

The question of an appeal and a rehearing was the subject of two articles and of a prolonged debate. It was decided that the award, duly pronounced and notified to the agents of the parties in litigation, shall decide the dispute finally and without appeal; and that a rehearing of the case may be permitted only when the right to demand it has been reserved by the parties in their agreement to arbitrate, and, in the absence of any stipulations to the contrary, only under the following conditions: first, the demand must be addressed to the tribunal which has pronounced the judgment; second, it may be based only on the discovery of a new fact, of such a kind as would have exercised a decisive influence on the award, and which at the end of the discussion was unknown to the tribunal itself and to the party demanding the rehearing; third, the tribunal itself must decide on the existence and importance of the new fact; and, finally, the agreement of arbitration must have determined the time within which the demand for a rehearing shall be made.

Mr. Holls began the discussion of these two articles by moving to strike out in the first one the words "without

appeal," and to substitute the words "every litigant shall have the right to a second hearing, before the same judges and within a period of three (or six) months." Professor de Martens opposed this motion for the reason that, by opening the door in advance to the possibility of revision, the conference "would tear down with one hand what it builds up with the other": would deprive arbitration of a part of its value and *eternalize* disputes instead of ending them. Mr. Holls admitted that the sentence should be final and without appeal, but said that his idea was not to permit an *appeal*, from one court to another, but a *revision*, by the same judges, and that only in case of the discovery of a new and important fact.

But this interpretation was also opposed by several members, in both the committee and the commission, their reasons being: the difficulty of defining and appreciating the importance of a new fact; the possibility of one of the judges dying before the revision, which would necessitate practically a new trial; the attacks upon the first award by the public press and by members of legislative bodies, which would be encouraged by the hope of a revision; the suspension of the execution of the award until after the revision; the possibility of discovering an important new fact within a few days after the lapse of the three or six months prescribed as the limit for the revision; the possibility that the important new fact may not be discovered until years after the award, — until the examination of the posthumous papers, for example, of one of the persons interested in the dispute; the diminution of that sense of responsibility which judges feel when called upon to pronounce an absolutely final verdict; the fact that *all* human justice is liable to err, and that, for

the sake of redressing a few exceptional errors, the entire system of arbitration should not be put in jeopardy.

These objections were answered one by one in the following way: the tribunal itself should decide on the existence and importance of the "new fact"; there is a possibility of one of the judges dying before the end of the arbitration itself, as well as before the end of the revision, and the vacancy must be filled in one case as in the other; the "attacks" of irresponsible parties upon an award in the hope of a revision would be more than counterbalanced by the enlightened opinion of the civilized world; the award should *not* be executed until substantial justice is assured; the close scrutiny and criticism of the case, immediately after the rendering of the award, will make it entirely probable that within three months, if ever, the important "new fact" will be found;[1] the moral responsibility of the judges would not be lessened, but rather increased, — as would be also the moral authority of the award, — if a provision for correcting errors on their part exists; and, finally, there is a limit to the principle that the chief end of arbitration is to settle promptly and forever international disputes, the limit, namely, imposed by justice and stated in Abraham Lincoln's famous saying: "Nothing is settled until it is settled right."

Mr. Holls and Professor de Martens were the champions, respectively, of the American and the Russian view of the question of revision, and each of them made able and eloquent arguments in both the committee and the

[1] The American delegation proposed as an amendment to its original proposition that the period within which the revision must occur shall be determined by agreement between the parties when the treaty for arbitration is made; this amendment was accepted.

commission. The warm and long debate ended, as i almost inevitable in an international as opposed to parliamentary assembly, in a compromise between the tw extremes. The principle of revision was adopted, but n as a general rule, and only under the well-defined excep tional circumstances stated above.

The last two articles in the code of arbitral procedu provided for the scope of the award and the expenses the arbitration, and gave rise to but little commen The award is obligatory only upon the parties who hav concluded the arbitration agreement. When there is question of the interpretation of a treaty participated i by other powers besides the parties in litigation, th parties shall notify these other powers of the arbitratio agreement which they have concluded. Each of thes powers has the right to take part in the arbitration; an if one or more of them exercises this right, the interpreta tion of the treaty contained in the award shall be equall obligatory upon them also.

Each party shall bear its own expenses and an equa share of the expenses of the tribunal.

b. The Conference of 1907

The code of arbitral procedure adopted in 1899 was referred to a special committee of examination in 1907. Its twenty-eight articles were increased to forty-one, and a few of these additions were of considerable importance, but only a few changes were made in the original ones.

It was provided that the arbitration agreement, or *compromise*, shall define not only the question in litigation

and the powers of the arbitrators, but also the date before which the arbitrators shall be appointed; the form, order, and time of the preliminary examination and discussion; the sum of money to be deposited in advance by each party for the expenses of the arbitration; the method of appointing the arbitrators; and the place of meeting and language of the tribunal. This extended rule in regard to the compromise was proposed by Dr. Kriege, of Germany, in order, as he said, to prevent delay and uncertainty in regard to the tribunal. But the danger lest a fulfillment of all these conditions by the parties in dispute might have the reverse of the desired result, caused the adoption of the further provision that the Permanent Court may establish the compromise if the parties agree to refer it to it. The German delegation proposed also a commission of five members (to be chosen from the Permanent Court, in the same manner as was provided for the choice of arbitrators) to establish the compromise when the parties so agree; and this proposition, too, was adopted after a long debate and considerable opposition. It was agreed that when a commission to establish the compromise is resorted to, it shall itself constitute the arbitration tribunal, unless otherwise stipulated by the parties.

The Austrian delegation, seconded by the delegation from China, renewed the proposition of Mr. Holls in 1899 to prevent members of the Permanent Court from being appointed to serve on an arbitration tribunal by their own governments, or the governments which appointed them members of the court, when the tribunal is composed of only three members; and when the tribunal is composed of five members, to permit one of them to be the citizen or appointee on the court of each of the parties.

This rule was adopted, but in the form already adopted for the formation of the tribunal.[1]

The Russian delegation proposed that the tribunal should always choose its own president, even when a sur-arbiter is one of its members; and Professor de Martens advocated this proposition for the reason that experience since 1899 has shown that a sur-arbiter may possess all the qualities valuable for casting a deciding vote on judicial questions, but may at the same time have no noteworthy qualifications of a presiding officer. But this proposition was rejected for the reasons, stated by Professor Lammasch, of Austria, that if the sur-arbiter is not given the presidency *ex officio*, it might be regarded as a certain lack of confidence in him; that the arbitrators may often be unknown to each other, and hence can not make a good choice; and that in the choice of a presiding officer, the tribunal might indicate a preference for his country and his cause.

The Russian delegation proposed the rule, advocated by the American delegation in 1899, that members of the Permanent Court should not be permitted to plead before the tribunal in the capacity of counsel or advocate, or to act as agents before it. The American, British, and Austrian delegations warmly supported this proposition; but it was still considered too drastic, and the conference adopted the more moderate German proposal that members of the Permanent Court may perform such services only for the power which has appointed them to the court. It was believed that this rule will not only enable each party to the dispute to be represented on the tribunal, and to utilize its best men as both arbitrators and advocates,

[1] See page 384.

but will also protect the good name of a judge from the suspicion of partiality which would attach to it in consequence of undue practice as a counselor or advocate before arbitration tribunals.

A rule of 1899 prescribed that the arbitration tribunal shall determine the period within which the parties must present their case in writing (the "preliminary examination" or *instruction*). Dr. Kriege, of Germany, moved to amend this rule so as to have this period determined in the compromise. The amendment was adopted for the reason that, as shown in the California Pious Funds case, the old rule required long and expensive journeys on the part of the arbitrators solely for the purpose of determining this preliminary point of procedure. It was also provided, however, on the motion of Sir Edward Fry, of Great Britain, that the period fixed by the compromise may be prolonged by common consent of the parties, or by the tribunal when the latter deems a longer time necessary for arriving at a just decision.

The German delegation proposed also the rule that the tribunal shall not meet until after the close of the *instruction*. But M. Fromageot, of France, showed by reference to the Behring Fisheries case that a question of procedure may suddenly assume capital importance and require the tribunal's decision before further progress can be made; also that the *instruction* may require the hearing of certain witnesses, the formation of a commission of inquiry, and the like. It was accordingly decided to adopt the rule that, except under special circumstances, the tribunal will not meet until after the close of the *instruction*.

The parties agree to furnish the tribunal, to the largest

extent they judge possible, the means necessary to decide the dispute; and when it becomes necessary for the tribunal to make investigations on the territory of a third power, it must conform to the rule adopted for International Commissions of Inquiry.[1]

To the rule that the deliberations of the tribunal shall take place behind closed doors were added the words "and shall remain secret."

Dr. Kriege, of Germany, endeavored to secure a provision that when an arbitral decision requires execution, the tribunal shall determine the period within which its execution shall occur. But Sir Edward Fry and Mr. Crowe, of Great Britain, strongly opposed this rule, and it was rejected on the ground that the tribunal has no power to enforce its sentences, and since their execution depends solely on the good faith of the parties, all appearance of coercion should be carefully avoided.

The rule of 1899, which required the minority members of the tribunal to sign the award, but permitted them, in signing, to state their dissent to it, was vigorously attacked by M. Loeff, of the Netherlands. He asserted that it was in flagrant opposition to one of the great fundamental principles of arbitral procedure, the principle, namely, which requires that the award shall be final, not only in the sense that it may not be appealed to another court, but also in the other sense that it should end all further discussion, especially outside of the tribunal's chamber. "We all know," he said, "the saying, 'Rome has spoken, the thing is finished'; it seems to me of the last importance that this same saying should be applied to an arbitral award and that it might be truly said, 'The

[1] See page 295.

tribunal has spoken, the affair is ended.'" Professor de Martens said in reply that it was an old established custom in arbitral awards to permit the minority members, who may be placed in the minority solely by the deciding vote of the sur-arbiter, to state their dissent to the majority award; but that he admitted the force of M. Loeff's argument, and was quite willing to have the matter considered by the committee of examination. As a result of this consideration, it was decided that the arbitral award shall mention the names of the arbitrators, but that it shall be signed only by the president and clerk of the tribunal. The former statement that the award shall be made by a majority vote is not retained, although it is, of course, implied; but the former provision, that a statement of the reasons upon which the award is based shall accompany the award, is retained in the new rule.

The finality of the award, in the sense of the inadmissibility of an appeal to another court, was reasserted; but, on the motion of the Italian delegation, it was provided that any difference which may arise between the parties concerning the interpretation or execution of the award shall be submitted, unless otherwise stipulated, to the decision of the tribunal which rendered it.

No change was made in the much-debated rule of 1899 concerning the revision of the arbitral award. Professor de Martens moved the suppression of the rule as being opposed to the essence of arbitration; he recalled the debate of 1899, and said that he had continued a firm opponent of revision ever since, that the Arbitration Tribunal of 1902 had joined unanimously in the expression of a desire to abolish the privilege of resorting to it, and that not one of the four arbitral awards rendered by the

Hague tribunals had given rise to a demand for revision. Ambassador Choate, of the United States, and the representatives of Belgium, Brazil, Germany, the Netherlands, Persia, and Roumania all opposed Professor de Martens's motion and replied to his arguments in very much the same way that the debaters of 1899 had done, with the additional reason that, since the rule as adopted represented an accepted compromise between very pronounced opinions, it would be best not to alter it in any way.

The code of 1899 having been discussed and amended, the French delegation proposed a series of additional rules which should regulate what it called "the summary procedure of arbitration." Professor Renault, in presenting the proposed rules, said that they were designed to be applied to the most frequent cases of arbitration — technical questions and those of secondary importance — which demand prompt solution. "We believe," he said, "that it is possible in such cases to apply the arbitral procedure adopted in 1899 in a simpler and more practical form, and our plan is inspired by the arbitral agreements already included in several treaties, notably in those between Switzerland and Germany, France, and Italy. The fundamental idea of our plan is the simplification of the arbitral tribunal's organization and its specialization." Baron von Bieberstein, of Germany, cordially indorsed the French propositions as well calculated to simplify arbitral procedure and to facilitate its use.

The five rules based upon the French propositions caused but very little discussion, and were unanimously adopted. They are prefaced by the statement that, with the object of facilitating the operation of arbitral justice

in controversies adaptable to summary procedure, the contracting powers have adopted the following rules, which will be observed in the absence of other stipulations and in subordination to the application of the foregoing rules.

Each of the parties to the dispute shall name an arbitrator. The French plan proposed that these should be chosen from among the citizens of the parties at variance, but on the motion of Sir Edward Fry this limitation was stricken out. The two arbitrators thus appointed shall elect a sur-arbiter. If they can not agree upon a sur-arbiter, each one shall present two candidates from the list of members of the Permanent Court, other than the appointees or citizens of the parties in dispute; the sur-arbiter shall then be selected by lot from the candidates. The sur-arbiter shall preside over the tribunal, which will render its decision by a majority vote. In default of previous arrangement the tribunal shall determine, as soon as it is formed, the period within which the two parties shall submit to it their respective memorials. Each party shall be represented before the tribunal by an agent to serve as an intermediary between the tribunal and the government which has appointed him.

The arbitral procedure shall comprise an examination of documents only; but each party shall have the right to demand the hearing of witnesses and experts, and the tribunal shall have the privilege of demanding oral explanations from the agents of the parties, as well as from the experts and witnesses whom it shall deem desirable to summon.

3. The Court of Arbitral Justice

The Conference of 1907

The proposition of the United States of America for the establishment of a court of arbitral justice was subjected to a preliminary discussion in four sessions of the first subcommission of the I Commission, to a detailed examination in eight meetings of a subcommittee (Committee B), to a final discussion in three sessions of the I Commission, and to a vote in the ninth plenary session of the conference itself.

Both the Russian and the United States delegations presented plans, in the early part of the conference, for the establishment of such a court; but the American plan was taken as the basis of the discussion. This plan was presented, the delegation stated, with the object of facilitating an immediate recourse to the judicial decision of international differences which diplomatic means have been unable to settle; and the proposed court was designed to be a permanent one, accessible at all times, and conforming, unless otherwise stipulated, to the rules of procedure adopted by the two conferences.

The eminent jurisconsult of the Netherlands, M. Asser, opened the preliminary discussion of the subject by a speech in the course of which he praised highly the Permanent Court of 1899 as being the pioneer stage in the progress of international justice, but pointed out its inadequacy for changed conditions and larger demands.

"Instead of a permanent *court*," M. Asser said, "the Convention of 1899 gave only the phantom of a court, an impalpable specter or, to speak more precisely, it gave a secretariat and a list. And when

two powers, having a difference to settle, . . . demand that the doors of the court at The Hague be opened to them, the Secretary-General, thanks to the munificence of Mr. Carnegie, can show them a splendid hall, but instead of a court he can only present to them a list on which they may find a large number of names of persons 'of a recognized competence, etc.' . . . You remember, gentlemen, how a great monarch, — who was not only a famous general but a philosopher as well, trained in the French school of the Eighteenth Century, — on the point of committing an injustice, was struck by the exclamation of a simple miller, who reminded him that 'There are judges at Berlin!'; and how, 'Charmed that beneath his sway justice was believed in,' he submitted to the simple miller's suit. Then, gentlemen, when some day a tribunal truly permanent shall sit here . . . it will not be without practical result that the nations shall invoke the famous article inspired by France — the article of *Duty* [1] — and shall say to a state on the point of committing an injustice, 'There are judges at The Hague!'"

Baron von Bieberstein, of Germany, in his memorable address on arbitration, followed M. Asser's indorsement of the proposed court by saying:

"The ideal of arbitration between nations will undoubtedly be advanced if we can succeed in improving and simplifying the procedure established by the Convention of 1899 for resort to the tribunal of The Hague. But the most important reform would be that which is indicated by the propositions of the United States of America and Russia, and which would consist in giving to the tribunal of The Hague the character of a really permanent tribunal. We indorse completely the praise which has been accorded to the work of the Hague tribunal; but we can not shut our eyes to its defects. I do not desire to criticise it, but quite the contrary. It is the great merit of the first conference to have pointed out the road for us to follow. A veritable permanent court, composed of judges who by their character and competence will enjoy universal confidence, will exert an attraction, *automatic*, so to speak, on judicial differences of every kind. And such an institution will secure for arbitration a more frequent

[1] Article 27; see page 304.

and more extended use than a general arbitration agreement which must be hedged in by exceptions, reserves, and restrictions. We are ready to exert all our efforts in working for the accomplishment of this task. By continuing thus the work of 1899, the second Peace Conference will not be inferior to the first; and it will justify the hope that its labors may contribute to the preservation of peace, by extending the empire of law and by fortifying the sentiment of international justice."

The third and fourth addresses on the subject were delivered by Ambassador Choate and Dr. Scott, of the United States. Mr. Choate spoke in English, but a résumé of his address, in French, was immediately read by Baron d'Estournelles de Constant, of France. He began by quoting from a letter of President Roosevelt to Mr. Carnegie, written at the time of the Peace Congress held in New York City in April, 1907, and expressive of the President's hope that the Permanent Court would be greatly increased in power and permanency by the approaching Peace Conference. He next touched upon what was to prove the supreme obstacle to the adoption of the American plan, the selection of judges.

"Our instructions are to secure, if possible," he said, "a plan by which the judges shall be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented, and that the court shall be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointments to it and that the whole world will have absolute confidence in its judgments."

Referring to the importance of the work of the first conference, Mr. Choate spoke of the fact that seventeen of its members, and about the same number of members of the Permanent Court, were members also of the second conference, and to them he made an especial appeal for

support in "building upon their work a still nobler and more commanding structure." As to the incompleteness of the court of 1899, he said that it had not proved adequate to meet the progressive demands of the nations or to draw to the decision of the Permanent Court any great part of the arbitrations agreed upon, — its inadequacy being shown by the fact that in the eight years of its existence only four cases have been submitted to it, and that of the sixty judges, more or less, who were named as members of the court, at least two thirds have not, as yet, been called upon for any service. He did not point out in detail the causes of the insufficiency of the existing court, but referred to the expense of resort to it, and described what he evidently considered its chief defect as follows:

"The fact that there was nothing permanent or continuous or connected in the sessions of the court, or in the adjudication of the cases submitted to it, has been an obvious source of weakness and want of prestige in the tribunal. Each trial it had before it has been wholly independent of every other, and its occasional utterances, widely distant in point of time and disconnected in subject-matter, have not gone far towards constituting a consistent body of international law or of valuable contributions to international law, which ought to emanate from an international tribunal representing the power and might of all the nations. In fact it has thus far been a court only in name, a framework for the selection of referees for each particular case, never consisting of the same judges. It has done great good so far as it has been permitted to work at all, but our effort should be to try to make it the medium of vastly greater and constantly increasing benefit to the nations and to mankind at large.

"Let us, then, seek to develop out of it a Permanent Court which shall hold regular and continuous sessions, which shall consist of the same judges, which shall pay due heed to its own decisions, which shall speak with the authority of the united voice of the nations and gradually build up a system of international law, definite and precise, which shall command the approval and regulate the conduct of the nations."

Mr. Choate then sketched in broad outline the court as planned by the American proposal, prefacing his sketch with the statement that his delegation had not attempted to fill in all the details, since these should be the result of consultation and conference among all the nations; he stated emphatically, too, that the proposed court was not intended to destroy but only to supplement the existing court, and that any nations who desired it might still resort to the method of selecting arbitrators provided in 1899.

His final appeal was an impressive one, and was greeted by hearty applause.

"Mr. President," he said, "with all the earnestness of which we are capable, and with a solemn sense of the obligations and responsibilities resting upon us as members of this conference, which in a certain sense holds in its hand the fate and fortunes of the nations, we commend the scheme which we have thus proposed to the careful consideration of our sister nations. We cherish no pride of opinion as to any point or feature that we have suggested in regard to the constitution and powers of the court. We are ready to yield any or all of them for the sake of harmony; but we do insist that this great gathering of all the nations will be false to its trust, and will deserve that the seal of condemnation shall be set upon its work, if it does not strain every nerve to bring about the establishment of some such great and permanent tribunal which shall, by its supreme authority, compel the attention and deference of the nations that we represent, and bring to final adjudication before it differences of an international character that shall arise between them, and whose decisions shall be appealed to as time progresses for the determination of all questions of international law. Let us then, Mr. President, make a supreme effort to attain, not harmony only, but complete unanimity in the accomplishment of this great measure, which will contribute more than anything else we can do to establish justice and peace on everlasting foundations. . . .

"Gentlemen, it is now six weeks since we first assembled. There

is certainly no time to lose. We have done much to regulate war, but very little to prevent it. Let us unite on this great pacific measure and satisfy the world that this second conference really intends that hereafter peace and not war shall be the normal condition of civilized nations."

Dr. Scott began his address by quoting Lord Salisbury's explanation of why arbitration was not more generally resorted to before 1899 — the nations' lack of confidence, namely, in arbitrators' impartiality — and Secretary Root's argument at the New York Peace Congress in favor of strengthening the court established in 1899. He then pointed out the strength and weakness of the latter court, and took up a detailed explanation of the proposed court, emphasizing especially the feature which he called its most important one, the selection of its judges. "It would appear at first sight," he said, "that to be truly international, a court must represent not one or several nations, but all of them. It is no less evident that, composed of a representative of each independent and sovereign state, it would be impracticable. Forty-five judges, sitting together, may form, indeed, a judicial assembly; it can not be said that they would constitute a court." The American plan accordingly proposed a court of not more than seventeen judges, nine of whom should make a quorum. Taking up the great problem of how to choose these seventeen judges, Dr. Scott first insisted emphatically upon the absolute equality of nations in the view of international law, and then showed how, in the adjudication of international differences, this absolute equality should be modified by differences in population and material interests. The American plan recognized, however, he said, that the composition of the court should not be based

strictly on differences in population and material interests, but should take into consideration the differences in judicial systems and in languages throughout the world.

Professor de Martens, in presenting the Russian plan for strengthening the existing court, said that he was in entire accord with Mr. Choate "on the essential and indisputable fact that the existing Permanent Court is not organized as it should be. An improvement is requisite, and it is our task to accomplish it, — a task the most important, in my opinion, of all those imposed upon us." He then referred to the relatively small use of the Permanent Court and to the Russian plan for requiring all its members to meet periodically and choose a permanent tribunal to be composed of three of its members. This tribunal would always be ready to arbitrate international differences; but it could be disregarded by the powers in dispute, and other arbitrators be chosen from the court, or it could be enlarged to five, seven, or nine members. M. de Martens stated the readiness of the Russian delegation to retire its proposition, as it had done in 1899, in favor of another plan as the basis of discussion; "for," he said, "when one is working for the triumph of justice and the welfare of humanity, every consideration of national and personal pride or ambition should disappear." He concluded his oration in these words:

"Allow me a few words more from the bottom of my heart. There have always been in history epochs when grand ideals have dominated and enthralled the souls of men; sometimes it was religion, sometimes a system of philosophy, sometimes a political theory. The most shining example of this kind was the Crusades. From all countries arose the cry, 'To Jerusalem! God wills it!' To-day the great ideal which dominates our time is that of arbitration. Whenever a dispute arises between the nations, even though it be not amenable

to arbitration, we hear the unanimous cry, ever since the year 1899, 'To The Hague! To The Hague!' If we are all agreed that this ideal shall take body and soul, we may leave The Hague with uplifted head and peaceful conscience; and History will inscribe within her annals: 'The members of the second Peace Conference have deserved well of humanity.'"

This inspiring appeal was greeted with prolonged applause, which was renewed when Baron von Bieberstein repeated briefly but emphatically that it was his country's desire to "accept the generous principles defended so eloquently by the delegates of the United States of America." M. de la Barra, of Mexico, and Sir Edward Fry, of Great Britain, then spoke briefly, the first offering a minor amendment to the American plan, but expressing his "enthusiastic adherence to every proposition designed to give more prestige to the Permanent Court and to facilitate access to it"; and the second saying, in six lines, that the British delegation did not hesitate to give its cordial support to the principle of the American proposal.

Two delegates from Argentina spoke next; one advocated the resolution offered by his delegation requesting the executive heads of governments not to accept the office of arbitrator until after a recourse to the Hague court has been rejected, and illustrated his argument by the example of President Roosevelt at the time of the dispute between Venezuela and Germany, Great Britain, and Italy; the other indorsed, in principle, the American proposition as to a permanent court and suggested that in the method of selecting its judges William Penn's plan of apportioning representation according to the amount of the foreign commerce of each state should be adopted, for the reason that "commerce and production

are certainly the best exponents of the vitality, intelligence, industry, and progress of nations."

At the opening of the next meeting of the subcommission, Mr. Choate accepted not only the spirit but the letter of the Mexican amendment to the American plan, and said that it indicated clearly the design of that plan, which was to leave the states free to apply either to the existing court of arbitration, or to the proposed court, or to any other means of settling their differences in a peaceful manner.

M. Beernaert, of Belgium, a distinguished jurisconsult and influential member of the first Peace Conference, and a representative from one of the "smaller powers," then arose and struck the first public note of opposition to the proposed court. In reply to the criticisms of the existing Permanent Court, especially those of Professor de Martens, he praised that court highly, and frankly expressed his preference for it as against the one proposed. *The* question at issue, he said, was the same as that "long debated in 1899," namely, "Is it better to establish a truly permanent international tribunal, in which judges few in number, and immovable or nearly so, will have to decide the disputes of the various states of the whole civilized world?" The proposition to answer this question in the affirmative he considered in line with those "vast projects, according to which the reorganized world shall form henceforth a single state, or at least a federation of states, having a single parliament, a single executive, a single superior court of justice. . . . In my opinion, this is the lamentable exaggeration of ideas which are true in themselves and which do honor to our century. They are moving across the world at this moment in great waves of fraternity and solidarity. Men of different

races know each other now, and are no longer enemies. An assembly like this, of which our fathers did not even dream, astonishes no one. This is the result of the enormous progress of all the sciences, which have annihilated distance, intertwined interests, and mingled the races. *But*, on the other hand, never has the feeling of nationality been more alive, and old nations and old tongues, which were believed to be asleep, have been seen to arise and demand again their place in the sunshine. None of us would wish to renounce his country, — his country, fond and dear, and none of us would consent to be governed from a great distance. We must, then, I believe, discard as a mere Utopia the dream of a world state or a universal federation, of a single parliament and a court of justice superior to the nations."

M. Beernaert then took up the knotty question of the method of selecting the judges and struck the keynote which was destined to be harped upon constantly until the end of the discussion. "The larger number of nations," he said, "would not have a judge of their own on the tribunal, and how can it command their confidence?"

M. Beernaert's address was greeted with prolonged and repeated applause, and the representatives of the smaller powers arose one after the other to express their doubts and make their reservations, especially that based on absolute international equality. The representatives of Mexico, Servia, Haiti, Venezuela, Brazil, Bulgaria, Portugal, Roumania, and Uruguay all voiced the determination of the smaller powers to secure, by one method or another, international equality in the selection of judges, or, failing this, to reject the plan of a new tribunal. Some of these representatives suggested plans by means of

which they believed the desired equality could be secured, and the Russian proposal that the Permanent Court should select the arbitral tribunal was indorsed by the delegates from Haiti, Venezuela, and Bulgaria. M. Ruy Barbosa, of Brazil, made a long argument against the establishment of a tribunal which would supersede all other arbitral tribunals, and insisted on the principle of international equality in the constitution of the new tribunal itself.

Panama and Persia [1] were the only small powers that tried to stem the tide of anxiety and dissent. Sir Edward Fry, speaking after M. Barbosa, stated in his characteristically short and decisive manner that there was not the slightest intention to supplant the court of 1899 or any other: "The choice of the nations will remain free," he said, "and it is very sure that the most efficient court will be chosen." M. Bourgeois, of France, whose words of praise for the existing court had been quoted by several speakers in opposition to the proposed tribunal, also made one of his characteristically conciliating and eloquent appeals in behalf of the American proposition. While emphasizing the praise he had bestowed upon the existing court, which he believed would continue to be most useful for the settlement of grave political differences, he insisted upon the great desirability of the proposed court for the settlement of many important differences of a judicial nature.

"We shall hope for, and we shall greet with joy," he said, "the day when, beside the court of 1899, or better, at its own fireside and perhaps created by itself, there shall exist a permanent tribunal for

[1] The Persian delegation later protested to the committee of examination against the "judicial inequality" of the proposed court.

affairs of a judicial kind, under such conditions that the smallest as well as the largest states shall find in it equal guarantees for the definition and security of their rights. . . .

"The world desires peace. For centuries it clung solely to the motto, 'If you desire peace, prepare for war'; that is to say, it confined itself to the *military organization of peace.* We are no longer at that stage of progress; but we must not be content with promoting the more humane organization, the *peaceful organization of war* [That is, in the other commissions of the conference, to whose work he had just alluded]. The words which have been uttered here have showed us the progress of education in this respect, the feeling, new and each day more urgent, of the solidarity of men and nations in the struggle with the fatalities of nature. We have confidence in the growing activity of these great moral forces, and we hope that the Conference of 1907 will take a decisive step beyond the work undertaken in 1899 by insuring practically and really the *judicial organization of peace.*"

Under the influence of this appeal, the commission referred the American proposition to the committee of examination by a vote of twenty-eight (including seven of the delegations which had made reservations), with twelve abstentions (including three of the delegations which had made reservations).

Ten days after this reference the committee entered upon the discussion of the plan, and devoted five weeks to its consideration. This committee (B) was composed of twenty-three members, representing sixteen countries,[1] and was presided over by M. Bourgeois, with Dr. Scott as reporter.[2] The American plan, amended in such manner by the delegations of Great Britain and Germany that it

[1] Seven of these were "large powers," and nine were small.

[2] Dr. Scott presented an able report on the articles adopted by this committee under the motto, "Inter leges silent arma"; but, in practical application of this motto, it is silent on the conflict of opinions regarding the constitution of the court.

was called by the name of all three of these powers, was the basis of the committee's discussion. Many of the most eminent members of the conference took part in this discussion, and as a result of it thirty-five articles were agreed upon which were adopted by the commission and the conference. These articles provide for the qualifications, term of office, privileges, and salary of the judges, the name, place of meeting, sessions, reports, jurisdiction, and procedure of the court, and for the assistance to be rendered to it by the Administrative Council and International Bureau, created in 1899, and by a new special delegation of three of the judges elected annually.

So carefully and thoroughly were the various needs of the new court provided for by these articles that Dr. Scott said in his report of the committee which formulated them: "We have not only wished to erect the fine façade of the Palace of International Justice; we have built and even furnished the structure in such fashion that the judges have only to take their seats."

But, important though these articles may become in the future and interesting though they are in themselves at present, it would be out of place to discuss them here; for, although they were adopted in the commission by a vote of thirty eight to three, with three abstentions, and in a plenary session of the conference by a vote of thirty-eight ayes, with six abstentions,[1] they are only, as various delegates called them, a building without foundations, a locked door without a key, a machine without power. They provide, in fact, a court without judges. For the

[1] In the commission, the negative vote was cast by Belgium, Roumania, and Switzerland, while Denmark, Greece, and Uruguay abstained; and from the conference vote all of these six powers abstained.

number and method of selection of the judges could not be agreed upon; and these features of the proposed court both its advocates and opponents agreed in calling its capital, its fundamental, its essential ones.

The intense struggle, on the one hand, to find some method of solving these two problems, and, on the other hand, to prevent their solution on any other basis than that of the absolute equality of sovereign states, began in the first meeting of the committee and was carried through to its last. It was marked by learned speeches and dramatic appeals, and by the entire abstention on the part of some of the members from any discussion of the project in the absence of a satisfactory solution of these fundamental problems. Mr. Choate, ably seconded by Dr. Scott's profound knowledge of international law, was the persistent, eloquent, resourceful champion of the progressive majority which was determined to find *some* way out; and, while proposing a plan on behalf of the American delegation, showed and proved his willingness to discuss and adopt any other plan which seemed applicable to the purpose in view. The plan he proposed was that each power should appoint one judge; that the eight judges selected by the eight "large powers" should sit as members of the court during the entire term of twelve years; that the judges appointed by the other powers should sit for periods of one, two, four, or ten years, so that the court should be composed of only seventeen judges at any one time. The classification of the "other powers" into four divisions (the one-, two-, four-, and ten-year divisions) was a very ingenious one and was based on the differences in population, language, and jurisprudence, etc., to which Mr. Choate and Dr. Scott had referred in the subcommission.

M. Ruy Barbosa was the insistent, learned, passionate opponent of this plan and the recognized champion of the absolute equality of sovereign states. At one time during the committee's deliberations he proposed, as a compromise plan, the reduction of the number of judges sitting at any one time to fifteen, thus enabling one third of the forty five judges elected to sit for four years, the judges to alternate according to the alphabetical arrangement of the countries appointing them. But he later withdrew this plan and avowed his preference for the old court as against *any* new one, and his determination to reject every plan not based on the absolute equality of sovereign states.

M. Barbosa's thoroughly conscientious and able opposition was supported by various other members of the committee, and, although none of the numerous plans suggested by Mr. Choate were really discussed, some of the advocates of the new court began to despair of arriving at any conclusion whatever. At last Sir Edward Fry moved a resolution that, "The conference deems it desirable that the signatory powers adopt the project for the establishment of a Court of Arbitral Justice, with the exception of the rules which have to do with the nomination of the judges and their rotation in office." Mr. Choate opposed this as the counsel of despair, and made one more proposition providing for the election of fifteen judges by the forty-five powers, each having one vote; but this proposition was voted down, and Mr. Choate then submitted to the inevitable by accepting Sir Edward Fry's resolution. This resolution, however, he moved to amend in a radical fashion by substituting for the words, "The conference deems it desirable that the signatory powers adopt the project," the words, "The conference adopts the project, and recom-

mends to the powers to make an agreement on the means of choosing the judges and constituting the court." The latter part of this motion was adopted, and on the suggestion of M. Nelidow, the first part of the resolution was phrased, "The conference recommends to the signatory powers the adoption of the project voted by it, . . ." and in this form it was adopted by the committee, commission, and conference.

When the committee's report was presented to the commission, it became the subject of another animated debate, or rather was made the opportunity of emphasizing the absolute equality of sovereign states in the view of international law, and a refusal to adopt the proposed court on any other basis. The delegations of Mexico, the Dominican Republic, Brazil, Guatemala, Norway, China, Persia, Siam, Chili, and Haiti stated their willingness to vote for the committee's report on that basis; the delegations of Switzerland, Belgium, and Roumania stated that they would vote against the report even on the basis of equality; while those of Denmark, Uruguay, Venezuela, and Greece emphasized the equality, but said they would abstain from the vote.

M. Barbosa, in another long and forceful address, emphasized the universal acceptance and the justification of the theory of the absolute equality of sovereign states in the eyes of international law; he also denied "the quarrelsome humor and political imbecility" attributed in the newspapers to Latin America in its alleged "hostility to the United States of America," and dwelt upon the friendship which existed especially between the United States of America and the United States of Brazil, reminding the conference that the Brazilian delegation had cordially supported the

American delegation in its efforts to secure immunity for private property on the sea, arbitration for contractual debts, obligatory arbitration, and the periodical meeting of the Peace Conferences, while it had opposed it only on the question of the Court of Arbitral Justice and the International Prize Court.

M. Barbosa's statesmanlike address was put in a still more favorable light by the ironical and triumphant speech of M. Beldiman, of Roumania, who insisted that the project for the court had met with entire failure and who exulted over the defeat of the American delegation in regard to it.

Mr. Choate made one short final appeal to the small minority that had voted against the project itself, to make the vote for the resolution unanimous, and M. Nelidow, president of the conference, added his plea as well; but the vote was maintained as before, — thirty-eight to three, with three abstentions, although in the plenary session of the conference the negative votes were changed, as in the vote on the project, to abstentions.

One final slight victory was secured for the court in the commission which decided that the recommendation of it should be called in the Final Act, not a "Desire" (*vœu*), as the minority wished, but a "Declaration," as was done in the first conference in the case of the resolutions relating to the use of "dumdum" bullets, asphyxiating gases, and the launching of projectiles from balloons. But this triumph was only a temporary one, for, in accordance with precedent, it could figure only as a "Desire" in the Final Act if any power objected to its being called a "Declaration," and this objection was made by Switzerland.

4. The International Prize Court

The Conference of 1907

At the second plenary session of the conference — the first business one — Baron Marschall von Bieberstein, of Germany, electrified the members by declaring that his government had instructed him to present to the conference propositions concerning the establishment of an international court to decide on the legality of captures made in naval war, the said court to be a high court of justice functioning as a court of appeal, while national tribunals should deliberate in the first instance. Sir Edward Fry, of Great Britain, immediately arose and expressed the great satisfaction with which he had listened to the statement of his German colleague, and said that the British delegation had received instructions of the same kind. General Porter, of the United States, before submitting the American proposition concerning the forcible collection of debts, also cordially indorsed the German suggestion.

At the first session of the I Commission, the German and British plans for the proposed court were presented, and were referred to the commission's second subcommission, whose sole duty it was to deliberate and decide upon this question.

The two plans were found to have the common object of permitting an appeal from the decision of national prize courts, but each sought to attain this object in a different way. A committee of three members[1] was accordingly appointed to draw up a list of questions based on the differ-

[1] Sir Edward Fry, Dr. Kriege, of Germany, and Professor Renault, of France.

ences in the two plans, these questions to be answered by the subcommission, and the answers to form the basis of a common agreement.

The first question, Shall an international court of appeal for prizes be established, was answered by the Baron von Bieberstein, in his opening speech before the subcommission, as follows:

"According to a principle universally admitted in the law of nations, every maritime prize must be confirmed by a judicial decision. At present, this decision proceeds exclusively from the jurisdiction of the captor's government. It is this government which establishes the tribunals and usually the procedure. Whatever may be the organization of this jurisdiction in the various countries, it can not be denied that this state of things is not satisfactory and is associated with grave inconveniences from the point of view both of the principles of justice and equity, and of the interests of individuals, as well as from that of the interests of neutral states and of the belligerents themselves.

"Prizes are made in the name of the state and, in principle, for the account of the state. Hence, in the inquest as to the validity of the prize, the rôle of the captor state is that of the defendant. Its interest is engaged in having the prize declared valid; it is a question of securing for the state the profit of the prize; the state must dread, quite naturally, to see the military acts of its armed forces nullified and declared illegal. The prize tribunals established by the captor state act involuntarily more or less under the influence of these interests of their country. At all events, these national tribunals do not enjoy that high judicial authority which is based on confidence in the entire independence and impartiality of judges.

"It is a natural consequence of this state of things that the national adjudication of prizes gives rise to constant disputes between the belligerents themselves, and with neutral nations; and these disputes do not cease to envenom international relations.

"It is, then, highly desirable that an international jurisdiction be established, whose impartiality can not be doubted. Its purpose is twofold: first, to protect the rights of individuals; second, — and this is a very important one, — to relieve the captor state from re-

sponsibility for the adjudication of prizes, which can thenceforth become no longer the subject of diplomatic claims. It is this twofold purpose which is sought by the German project now within your hands, which proposes to internationalize jurisdiction over prizes by the establishment of an International High Court, composed of representatives of the belligerent powers and of neutral states, and summoned to pass, in the second and last instance, on the legality of prizes adjudged, in the first instance, by the national tribunals of belligerent powers. . . .

"We have confidence that the conference will succeed in finding the right solution of the problems connected with the jurisdiction of prizes. And we shall be happy to coöperate in a spirit of conciliation with our colleagues in the achievement of this noble task. The good reception which has been accorded to our plan by two of the largest maritime powers confirms our confidence."

Sir Edward Fry, in replying *Yes* to the first question, said that, "in the present state of things, each nation proclaims for itself what it believes to be international law; the courts of each country thus feel bound by their national system of jurisprudence in regard to prizes. In order that an international court may apply the veritable international law, its members must be free from all prejudice and from all partiality."

M. Ruy Barbosa, of Brazil, inquired why the proposed court should be one of appeal only; but, while expressing the hope of a future agreement which would establish both original and appellate jurisdiction, he also answered *Yes* to the first question. M. Tsudzuki, of Japan, while expressing his cordial indorsement of the proposed court as an ideal to be striven for, said that his delegation would abstain from voting for such a court until a clear and precise code of international prize law should be agreed upon. This objection had already been anticipated by Baron von Bieberstein in his opening speech, and had been answered

by the statement that the Declaration of Paris of 1856 and certain treaties had already become the basis of a conventional law on the subject, and that he had strong hopes that the conference would complete or amplify the code. M. Hammarskjöld, of Sweden, indorsed the proposed court as "one of the greatest steps of progress, and one of the richest in its promise for the future," and begged that the plan be not halted by difficulties of a rather doctrinaire character.

At a little later stage of the discussion, Ambassador Choate expressed the American delegation's cordial indorsement of the project by saying:

> "Representing as we do a widely extended maritime nation, and a nation which hopes and confidently expects always in the future to be a neutral nation, we deem the establishment of an international court of prize by this conference to be a matter of supreme importance. . . . It will certainly be a tremendous triumph of justice and peace if this conference, before it dissolves, shall succeed in creating such an arbiter between the nations. . . . One great international court will be a marked advance in the progress of the world's peace, and will go far to satisfy the universal demand which presses upon us so strongly from every section of the world."

Mr. Choate's address was designed to secure a compromise between the divergent features of the German and British plans, and he moved to refer the two plans to a committee of examination to decide upon this compromise. This motion was adopted, but not until the divergence of view had been plainly revealed.

The question, Whether the court should have jurisdiction only between two governments or between one government and individual citizens of another, was answered by Sir Edward Fry in the first sense, for the reason that in

an international court it is logical that only governments, and not individuals, should be suitors. Dr. Kriege, of Germany, on the other hand, argued that injured individuals and not their government should come before the court, and for the following reasons: this would prevent a dispute between two governments, and would prevent a prize case from being exaggerated into an arbitration; it would prevent a claimant state from being forced into the embarrassing position of either neglecting the defense of its citizens' interests, where it was impossible to make a careful examination of their claims, or of supporting ill-founded claims; it would enable individuals to apply to the court without difficulty, and yet, by requiring them to bear the expense of unsustained suits, they would be deterred from presenting ill-founded claims. M. Hagerup, of Norway, and Colonel Borel, of Switzerland, in adopting the German view of this question, added the arguments that small powers would often be stopped by political considerations from making an appeal on behalf of their citizens, and that individual appeal is in line with the progress of international law.

M. Bustamente, of Cuba, proposed as a compromise to permit *both* individuals and their governments to apply to the court; and Mr. Choate, while favoring the right of individual suitors, suggested that the question might be left to the determination of each country. The compromise actually adopted was that governments could institute the suit in some specified classes of cases, and that individuals could do so in other specified classes, unless forbidden to do so by their own governments.

The next question, Whether the court should have jurisdiction over *all* cases of capture, or over only those in which neutrals are concerned, was answered by Sir Ed-

ward Fry in the latter sense, for the reasons that a state of war suspends certain relations of law between belligerents and that there are certain questions between belligerents which can not be submitted to an international court. Dr. Kriege, on the other hand, favored the opening of the court to the citizens of belligerent states, as well as to neutrals, because this would conform to the modern idea of war, according to which the inhabitants of the enemy's territory are not placed outside of law; and because an international application is desirable for such international conventions as the Declaration of Paris that the "neutral flag covers the enemy's goods," and America's *proposed* rule abolishing the capture of the enemy's private property. Mr. Choate admitted the resort of both neutrals and belligerents to the court, but emphasized the impossibility of permitting the citizen of a belligerent power to appeal to the international court from the decision of the courts of his own country condemning him for a violation of its own laws, such as, for example, its foreign enlistment act, or for an attempt to violate a blockade established by it.

The compromise adopted in this case provided for the appeal both of neutrals and of belligerents in certain classes of cases. Thus the right of appeal of both neutral states and citizens is fully admitted, in recognition of the fact that the court is established preëminently in the interests of neutrals; while the right of both belligerent states and citizens is admitted under carefully defined conditions.

The next question was, When shall the rôle of the international court commence: directly after the national prize courts of first instance have rendered their decision, or not until the highest national court has rendered its decision? Sir Edward Fry recalled the fact that certain large maritime

states possess prize courts of long standing and high renown, for example, the Supreme Court of the United States and the British Committee of the King's Privy Council; and for this reason argued that the international court should not have jurisdiction over cases until such national courts had passed upon them. This course also, he said, would give the international court the benefit of the nation's brightest legal lights. Dr. Kriege admitted the theoretical justice of Sir Edward Fry's proposal, but claimed that it would give rise to practical and political difficulties; for example, it would render the procedure singularly slow and expensive, the examination of evidence and the rendering of sentence often requiring several years; and hence the amount of capital represented by the ship and cargo seized, which is often very considerable, would be paralyzed, instead of speedily released, as the modern condition of commerce requires. Moreover, the well-known political interests of the captor state require that only the decisions of its lower, and not of its highest, courts should be reviewed by an international court. Mr. Choate expressed his opinion very decidedly in favor of the British answer to this question, "because," he said, "our people, by history and tradition, are so much in love with the Supreme Court of the United States, which they so believe to be the tribunal in which the gladsome light of jurisprudence rises and sets, and to be a court which commands the almost equal respect and admiration of other nations, that we could hardly go home in safety with the report that we had unnecessarily consented to any plan which would leave that court out of the administration of prize law. I think we may state, without contradiction, that in the last hundred years it has taken a very considerable part in the making of the

prize law which now constitutes a portion of the established international law of the world, and that its decisions in prize are in substantial conformity with the decisions of all the maritime jurisdictions which have dealt with the subject, so that we are as firmly wedded to it as an indispensable factor in the future adjudication of prize law as our colleagues of the British delegation are to their court of last resort. It was to the decisions of the great Lord Stowell that our great jurists Marshall and Story looked for light and leading on such questions, and it is not too much to claim that together they settled the law for the world." But despite this attachment to the Supreme Court, Mr. Choate said that the United States Congress might reciprocally consent to an appeal by aliens in prize cases from the courts of first instance to the international court, "in view of the enormous benefits to be derived by the whole world from the successful establishment of an international prize court," and that it would be sustained in so doing by the popular judgment.

M. Hagerup, of Norway, said that the question and the answers to it illustrated the need of an international court which should replace *all* national prize courts; but that since this is impossible at present, he would propose that no more than two national courts be resorted to, and that the parties should always have the right of renouncing one of them. General Poortugael, of the Netherlands, supported this proposition and cited the case of Jarndyce *versus* Jarndyce in Dickens's "Bleak House" as indicative of the delay and expense involved in multiplied jurisdiction.

The conference decided against an exclusively international jurisdiction in prize cases, for the practical reason that national courts can dispose more simply and more

rapidly of a great many cases which would never be taken to the international court at all. But it adopted M. Hagerup's suggestion that national jurisdiction should be exercised in no more than two classes of courts. Each country may decide, by its own legislation, whether a case shall be appealed from a court of first instance directly to the international court, or be subjected to the jurisdiction of one higher national court. For this reason, the international court is not called a "Court of Appeal" or a "Supreme Court," but merely the "International Prize Court." And to prevent undue delay, it is provided that if the national courts fail to render a definitive decision within two years after the date of the capture, the international court may entertain a suit in original jurisdiction.

The fifth question, Shall the international jurisdiction have a permanent character, or be constituted only on the occasion of each war, was answered by the British plan in favor of a permanent court; and Sir Henry Howard, of Great Britain, urged in favor of such a court that it would have the stability, tradition, contiguity of procedure and continuity of principles, the judicial prestige and moral authority which would be wanting in temporary tribunals created for special occasions. Dr. Kriege admitted the force of this reasoning, and said that the German plan had at first provided for a permanent court, but had later discarded it because of the practical consideration that public opinion would not understand why a permanent court should be established, if simply called upon to function in the abnormal event of a war; and also because of the difficulty of deciding upon the composition of a permanent court which should necessarily be small, but in which forty-five states would have a right to be represented.

M. Ruy Barbosa advocated the British plan of a permanent court, and urged in its support the argument that permanence of function alone gives to a court stability, material and moral independence, an inflexible application of the law, and that entire confidence of the interested parties and of the world in general which is absolutely necessary to the success of such an institution; the appointment of judges on the outbreak of a war would be exposed to disadvantageous influences, and even neutral judges appointed at such a time would be partial towards one or the other belligerent, especially if the belligerents are large powers.

Mr. Choate stated the strong preference of the American delegation for a permanent court, "lasting not for each war, which might make it almost an annual affair, because wars are so numerous, but a court which should last for all time, and should gradually settle all international differences in prize law and establish an international jurisprudence which should cover all cases and command and satisfy the confidence of all nations." But here again Mr. Choate suggested as a middle ground a court whose jurisdiction should be permanent, but whose judges should be added to in case of war by the appointment of another judge by each belligerent.

This compromise was adopted and provided that the judges should be appointed for a term of six years, and be eligible to reappointment; that the judges appointed by the eight "large powers" should sit continuously, while the judges appointed by the other powers should sit in turn for portions of the term of six years; and that each belligerent should be represented on the court in time of war by its appointee.

The sixth question had to do with the constitution of the court, the number of judges, their appointment and qualifications.

Sir Henry Howard urged the British plan of requiring that judges should be chosen from among those persons whose special competence would seem to mark them out for the service; but both he and Sir Edward Fry expressed their willingness that naval officers should act as assessors of the court and should be consulted on technical matters. The German plan proposed that the court be composed of five members, two of whom should be admirals appointed by the two belligerents; and Dr. Kriege argued that their knowledge of facts and their technical experience would make them most useful members, while the possession of a deliberative, instead of only a consultative, right would render them more impartial. Professor de Martens, of Russia, approving of the German plan, said that the two admirals could explain the laws and regulations of their own countries, and would afford a *visible* guarantee that the rights of the belligerents would be respected. Mr. Choate favored the British plan, and said that "a court is a court and a jurist is a jurist," and the introduction of any other element than jurists would tend to detract to that extent from the true judicial character which the court should possess; on the other hand, if the two admirals sitting at either end of the court are designed merely to represent their own countries and "to neutralize or kill each other off, why have them at all? Will it not simply end in their mutual slaughter without adding any new life, strength, or vigor to the court?" The Anglo-American answer to the question as to qualification was adopted, and the rule provides that all the judges appointed shall be

jurisconsults of recognized competence in questions of international maritime law and enjoying the highest moral consideration.

The question as to the number and appointment of the judges gave rise to the same kind though not to the same length or intensity of debate, as it did in connection with the Court of Arbitral Justice. The German plan proposed the appointment of five judges, two of whom were to be appointed by the two belligerents, two others by two neutral powers chosen by the two belligerents, and the fifth by a third neutral selected, by lot, if necessary, by the other two neutrals. Dr. Kriege advocated this plan for the reason that it gave representation to both belligerents and neutrals, and by requiring the three neutral judges to be selected from the members of the Permanent Court of The Hague, it would closely unite the two international courts.

Sir Henry Howard, opposing this plan, said that it required a temporary court, appointed on the outbreak of a war; and that it would perpetuate the chief defect of the existing system, which gives to belligerents the exclusive power of determining the rights of neutrals; for the German plan would give the appointment of the court to belligerents, their friends, and the friend of their friends, and no matter how great the hostility between the belligerents, they will always have common interests to defend against neutrals.

The British plan provided that "each of the signatory powers whose merchant marine, on the date of the signature of this convention, is more than 800,000 tons, shall designate one" judge;[1] but if any of these powers should

[1] This plan would have made the court consist of eight judges, appointed by Great Britain, the United States, Germany, Norway, France, Japan, the Netherlands, and Italy.

be a party to a suit, its appointee was to take no part in the decision of the case. Sir Henry Howard urged in favor of this plan that it provided for the appointment of judges not by belligerents as belligerents, but by all states having a considerable share in maritime commerce; and that it insured impartiality by excluding the judges appointed by the powers interested in the case before the court. He added that his delegation was willing to take one step further and exclude the appointees of any powers who enter on a war during the continuance of the war. Dr. Kriege, while admitting the impracticability of having a court of forty-five judges, so that each nation could be represented on it, objected to the British plan because it was liable to the "reproach of lacking in equity," and permitted the possession of a few ships more or less to determine the right of appointment, while it did not distinguish between those powers which have far more than 800,000 tons of merchant marine and those which had no or only a little more.

The British plan would have excluded from the court appointees of two of the eight "large powers," Russia and Austria, and put the appointees of Norway and the Netherlands in their places. The delegations of the two "large powers" excluded did not oppose the plan in the subcommission, Professor de Martens simply remarking that "since Russia does not possess the minimum of merchant marine necessary, according to the English plan, to be represented in the International High Court, its delegate will confine himself to presenting some purely academic observations," — on the qualification of the judges.[1]

[1] M. Mercy briefly expressed Austria's approval of the court and its preference for the German plan, but said that he had no doubt of a committee readily reaching an agreement on its details.

M. Ruy Barbosa, however, did not at all confine himself to such observations, but expressed himself vigorously against the British plan. His arguments were, in brief, as follows: no provision is made by the plan for the admission to representation of those powers whose merchant marine reaches the requisite minimum *after* "the date of the signature of this convention"; the interests of the large powers are alone considered, or at least made supreme, by it, and the weak will have to submit to the justice of the strong, whose common interests may not incline them to respect sufficiently the rights of the weak, especially since it is usually the most powerful who have the least reason for obeying the law; the function of the court is designed to be strictly judicial, and for the fulfillment of this function, the possession of a minimum amount of marine tonnage is no proper qualification; an important mass of tonnage, possessed by countries, each with a small amount, but larger in the aggregate than that of several of the powers represented on the court, is not given any share in the appointment of the judges; a world court is desired, and yet the British plan would bar out many states from having recourse to it by depriving them of the confidence which they would have in it if they were given a share in the appointment of its judges; finally, the plan is particularly objectionable because it differs utterly in principle from the Permanent Court of Arbitration, which provides for general representation.

While stating these objections emphatically, M. Barbosa admitted that since the court must in practice be much smaller than one of forty-five members, and since it would have to do with disputes concerning merchant marine, it was only natural that a restriction of its members should

be based on the importance of the merchant marine possessed by each of the powers. He proposed, therefore, that the nations whose merchant marine was inferior to the designated tonnage should be admitted to the appointment of members of the court, according to some agreement among themselves, or by some other method. The representatives of Sweden and Persia also objected mildly to the British plan, and indorsed some such method as that suggested by M. Barbosa. The committee of examination, appointed at the end of this session of the subcommission, took up the work of solving this problem of the appointment of judges, and its solution, which was adopted by the conference, will be referred to a little later.

The subcommission itself practically settled two other questions, the seventh and eighth on the list, in connection with the proposed court. In reply to the question, What principles of law should the court apply, the British delegation replied that these principles should include treaties and, in default of these, the generally accepted principles of international law; when questions arise on which there is difference of opinion in regard to international law, the court must itself adopt one principle or the other, and thus aid in the development of international law. Baron von Bieberstein expressed his entire satisfaction with this answer; but M. Nelidow, of Russia, inquired why the British plan did not include the laws of the captor country, and said that before judging the acts of naval officers, account should be taken of the laws, regulations, and instructions of their country. To this, Sir Edward Fry replied that the greatest evil of the present condition of affairs arises from the multiplicity of national laws relating to prizes; and M. Nelidow agreed with him that the

essential thing is to find an international law which can be accepted by all the world. The article adopted embodied the British idea and expressly stipulated that the court can not regard the procedure enacted by the legislation of the captor country in cases where it believes that its results are opposed to justice and equity.

The final question, Should the order and method of presenting evidence before the court be regulated, was answered in the affirmative, and the method adopted was in line with that adopted for the courts of arbitration. M. Hagerup called attention to the custom of many national prize courts of placing the burden of proof upon the owner of the captured vessel, and denounced this custom as unjust because "he who disposes of the property of another should prove his right to do so, . . . even though it be a state, or its agent, which makes the capture." The method adopted calls for the presentation of documentary and other proof from *both* parties.

When the committee of examination took up the work of deciding upon a plan consistent with the views expressed in the subcommission, it found its task much simplified by the presentation of a plan agreed upon by the delegations of Great Britain, the United States, Germany, and France, and embodying the compromises already suggested. It was able, consequently, to agree upon a final report after only three meetings and comparatively little difficulty.

The only part of the plan which caused much discussion or any opposition was that concerning the constitution of the court. At the first meeting, Mr. Crowe, of Great Britain, presented the revised plan for the appointment of judges, and said that the prime element in this matter

was the maritime interest of the different powers. "It is proper," he said, "to remember that certain nations will reap only profit from the court, whereas others, endowed with larger navies, will have to fulfill certain obligations and duties as well. We believe that it was just to accord to the nations which possess a considerable marine — and whose officers in consequence will have often to justify their conduct before the court — a direct and permanent representation." Sir Edward Fry had already stated that the plan provided for fifteen judges, eight of whom were to be appointed by "eight of the large powers," which possess not only the largest naval forces but also a very considerable merchant marine; "and they are the only ones," he added, "which will in all probability be defendants before this new prize court." These were the only arguments advanced in support of this part of the plan; but they were accepted without opposition in the committee. Mr. Crowe proceeded to explain that the suggestion to have the other seven judges elected by groups of the other states had been discarded, for the reason that any such classification would have been unable to secure the unanimous indorsement of the conference; the plan proposed, therefore, gave to each of the other states the appointment of a judge, who should be appointed for a term of six years, but should sit in the tribunal for a shorter period, depending upon the importance of his country's merchant marine. He presented a table of the "other powers," to whose judges were assigned seats for periods ranging from one to four years. On the motion of M. Hammarskjöld, the committee adopted without discussion the amendment that the "other powers" should be represented on the court during the continuance of any

war in which they might be engaged, the retirement of the judges whose places would thus be filled to be determined by lot; and this amendment afterwards secured the acceptance of the court by several powers.

The opponents of this plan of appointment were not ready to discuss it on its first presentation, but in the two succeeding meetings of the committee M. Barbosa expressed his opposition to it. He stated that the court of arbitration and the prize court differed in that the latter had to do only with states which had maritime interests, and admitted the justice of the principle on which the appointment of its judges was based. But the application of the principle in the proposed plan he objected to for the reason that Brazil was ranked in the fourth class of "other powers," whose judges would sit for only two of the six years; whereas, according to the best statistics he could find, its merchant marine should place it above Belgium, Portugal, and Roumania, which were ranked in the third class, and far above Switzerland and Servia, which do not possess a single ship and yet are ranked, the one above, the other together with, Brazil. M. Esteva, of Mexico, indorsed M. Barbosa's objection, which was applicable to the rank assigned Mexico as well; but Count Mortera, of Spain, although his country possessed more merchant marine than Austria, one of the favored eight "large powers," said that his delegation would accept the second rank assigned it,[1] provided that a periodical revision should be made. And M. Hagerup said that, although his country's merchant marine ranked fourth among all the powers of the world, it would accept the eleventh place assigned it, in the third class of smaller powers. "It makes this sacrifice," he

[1] That is, the first class among the "smaller powers."

said, "with the object of aiding the accomplishment of a useful task which will have great results in the development of international law." M. Hagerup's short speech was warmly applauded, and under its influence the opposing minority was appealed to by Professor Lammasch, of Austria, and Mr. Crowe, the former of whom urged that not only merchant marine but naval force as well — not only captives but captors also — had been considered in the plan; while Mr. Crowe argued that if one judge for the entire period were assigned to Norway, for example, and Great Britain, the United States, and Germany were assigned judges solely in proportion to their merchant marine, the desired number of fifteen judges would be far surpassed; hence certain countries must be resigned to figure in the same group with powers that have much less tonnage. But the minority did not yield their objections, and to the next meeting of the committee M. Esteva sent a letter stating that his country had instructed him to reject every plan in which "all the states summoned to the conference, large or small, strong or weak, are not regarded under the most absolute and perfect equality"; and M. Barbosa made another speech pointing out the mathematical inequalities of the ranking of the states, especially of Brazil, Mexico, Argentina, and Chili, both as regards their merchant marine and their naval forces. No reply was made to this speech, and the committee adopted the plan by a vote of ten delegations to one.

When the committee's report was presented to the I Commission, M. Barbosa immediately took the floor to state that the Brazilian delegation had been one of the most consistent and foremost advocates of the establishment of an international prize court, its exclusive jurisdic-

tion over prizes, its permanence, and the apportionment of its judges among the powers according to their maritime interests; but that precisely because of this fact it had opposed the plan of appointing judges which was alleged to be based on the three elements of the tonnage of merchant marine, the value of maritime commerce, and the strength of naval forces. This plan, he charged, was unjust, on this basis, to American states, and especially to Brazil; and his delegation would vote against the project.

On the other hand, the delegations of Mexico and Argentina, on whose behalf M. Barbosa had made an appeal against the plan of appointment, both announced, the first that it would not oppose, and the second that it would vote for, the report as presented by the committee. M. Esteva said that his withdrawal from opposition was authorized by his country under the influence of its desire to coöperate in an effort for peace. M. Larreta, of Argentina, in a much applauded speech, said that his country's adherence to the plan was due to its belief that the court established by it would render impartial decisions, instead of the more or less partial ones rendered at present by belligerent courts, and that it would be the first international jurisdiction created by the civilized world, and would become immediately, not only a desirable step forward, but an indispensable institution.

"We accept the place accorded to the Argentine Republic in the distribution of judges," he said, "not only because we believe in the good faith which has determined it, and which, in fact, approximates the truth, but also because we have regarded the project less as a problem in arithmetic than as an institution of trust and harmony. It may be that the Argentine Republic should have had a higher ranking. We are to-day the leading exporters of cereals in the world. . . . But this little sacrifice we make freely, in homage to this great work of law and justice."

Of the other Latin-American delegations, the Venezuelan announced that it would abstain from voting on the plan because, although designed to establish a much-to-be-desired institution, it flatly contradicted the principle of the equality of sovereign states; and the delegation from Chili announced that it too would abstain from the vote while awaiting new instructions.

The delegations of Roumania, Norway, Greece, Belgium, and Servia, in announcing their acceptance of the plan, stated that it was acceptable to them in spite of its unequal distribution of the judges, because there was an essential difference between a court of arbitral justice, in which there should be absolute equality of representation, and a prize court, which would be called upon to adjudicate only one special kind of international differences.

After this general discussion of the plan, the commission slightly amended the articles submitted to it and adopted them by a vote of twenty-seven to two (Brazil and Turkey), with fifteen abstentions.[1]

When the articles were reported to the conference in plenary session the negative vote was reduced to one (Brazil; Turkey this time abstained), the abstentions were reduced to five, and the favorable vote was increased to thirty-eight, although ten of the countries casting a favorable vote conditioned it on the reserve of the article relating to the appointment of judges. In view of the one negative vote against the articles establishing the prize court, they could not, according to the precedent set by the first conference, have taken their place as an adopted convention in the Final Act of the conference; but the committee

[1] Ten of the delegations abstaining were Latin American; the other five were: Denmark, Russia, Montenegro, Persia, and Japan.

having charge of the Final Act received the assurance of M. Barbosa that Brazil would not oppose this action. Hence the "Convention relative to the Establishment of an International Prize Court," with its fifty-seven articles, figures as one of the thirteen conventions adopted by the conference.

XIV. A SUMMARY OF RESULTS AND THEIR HISTORICAL IMPORTANCE

A. ATTEMPTS

The direct results of the labors of the two conferences were expressed in the form of conventions, declarations, and desires (*vœux*). Under the last named are to be found what may be called the "attempts," as distinguished from the "achievements," of the conferences. It would not be fair to call these "failures," as distinguished from "successes"; for, aside from their indirect result of recognizing and sustaining public sentiment, they may have the direct result in the near future of inciting the governments to enter upon a serious study of certain pressing problems and thus to inaugurate a campaign of education which will result in the molding of national public opinion concerning those problems and the attainment of an international solution of them.

This solution may be confidently hoped for in succeeding conferences; for it will be noted that even within the short period of eight years some of the "attempts" of the first conference became the "achievements" of the second.

a. THE CONFERENCE OF 1899

I. ARMAMENTS

The action of the first conference on the question of armaments was the unanimous expression of a belief and

a desire; the belief, namely, that "a limitation of the military expenses which now burden the world is greatly to be desired in the interests of the material and moral well-being of mankind"; and the desire that "the governments, having regard to the propositions advanced in the conference, shall take up the study of the possibility of an agreement concerning the limitation of armed forces on land and sea, and of military budgets."

This action was in no sense a limitation of armaments, and, indeed, the increase of armaments continued at redoubled speed after the adjournment of the conference. But the attention of the nations was forcibly directed to the question; a standard was erected, an ideal held up, to serve as the goal of future efforts; Argentina and Chili reached that goal three years after the conference adjourned; and some of the governments took up a study of at least one phase of the question and entered upon a direct communication with each other as to the results of their study one year before the second conference assembled.[1]

This study was considered by the second conference as wholly inadequate, and as having induced some of the larger powers to decline to enter upon a further international discussion of the subject. But the appeal of the Conference of 1899 for a thorough study of the question was still considered as the *sine qua non* of its solution, and was accordingly repeated by the Conference of 1907.

[1] See United States Senate Document, No. 444, 60th Congress, 1st Session, page 9.

II. WARFARE ON THE SEA

1. *Marine Cannon*

The conference voted to refer the question of prohibiting the introduction of new types of marine cannon, and of those with larger caliber, to study by the governments. But there seems to have been but little hope in the conference that the governments would act upon this vote, and there is no evidence that they have done so.

2. *Torpedo Boats and Rams*

The proposition to prohibit the use of submarine torpedo boats, or plungers, met with so much opposition that it was abandoned.

The propositions to prohibit the construction of war ships with rams, and to mask the rams on war ships in time of peace, were also abandoned, and without formal action.

3. *The Private Property of Belligerents*

The United States proposition that the private property of belligerents should be exempt from capture in maritime warfare was referred, by unanimous vote, to a later conference for discussion. But the importance of the question and the reasonableness of the American proposition were presented to the conference, and through it to the nations, in an impressive address by Ambassador White; and the delegation from Italy stated its country's adhesion to the proposition both in principle, as an international

rule, and in practice, as applied in the treaty between Italy and the United States.

The fact that this American proposition was pushed to no further conclusion should be viewed in the light of what was accomplished by the conference in the direction of arbitration. Ambassador White wrote in his diary at the time of his efforts in behalf of the exemption of private property on the sea: "What we are sent here for is, above all, to devise some scheme of arbitration; and anything which comes in the way of this, by provoking ill feeling or prolonging discussion on other points, will diminish our chances of obtaining what the whole world so earnestly desires."

4. *Neutral Rights and Duties*

The comparatively unimportant right, or "faculty," of neutral states to send their naval attachés to the theater of maritime warfare, was the only neutral right or duty on the seas discussed by the Conference of 1899; and the conference declined to sanction even this right. But the raising of the question of neutral rights and duties in warfare on the land led to the adoption of a desire that the entire question should be referred to a later conference. This desire was heeded in 1907, and an important code of rules concerning the rights and duties of neutrals on both land and sea was adopted by the second conference.

5. *Laws and Customs of Naval Warfare*

An attempt was made to have one custom of naval warfare, that of bombarding unfortified seaports, regu-

lated by international agreement. But the conference consented only to have this question referred to a later conference. This reference met with entire success in 1907, however; and the work of the first conference in codifying the laws of warfare on land inspired the second conference to regulate various other customs of maritime warfare than that of bombardment.

III. WARFARE ON LAND

1. *New Arms and Methods*

The various attempts to prohibit the introduction or use of new and more powerful kinds of explosives, cannon, and muskets came to naught in the conference, and have been commonly regarded as absolute failures. It may be noted, however, that these attempts were based on the Declaration of St. Petersburg of 1868, which was ratified by seventeen European powers; and that the spirit of this declaration was successfully appealed to in the case of a new kind of bullets the use of which was prohibited by the first conference.

2. *Neutral Rights and Duties*

Nothing was accomplished by the first conference in the definition and sanction of the rights and duties of neutrals in warfare on the land. But the importance of the question was so impressively stated that the conference voted unanimously to refer it to the next conference; and the second conference made extraordinary progress in the solution of it.

IV. ARBITRATION

1. *Obligatory Arbitration*

Universal obligatory arbitration, that is, obligatory arbitration for *all* classes and cases of dispute, was considered by the conference entirely impossible under the existing circumstances, and no delegation even proposed it.

On the other hand, the importance of obligatory arbitration for certain classes of cases as a means of asserting the principles of law in international relations and of eliminating many troublesome misunderstandings between states, was emphatically asserted and freely admitted. The attempt was accordingly made to secure a convention providing for obligatory arbitration in eleven classes of cases, in so far as these cases should not affect the vital interests or the honor of the parties to the dispute. In the face of strong opposition, and in order to insure unanimous support for the Permanent Court of (voluntary) Arbitration, this attempt was abandoned before the proposition was brought to a formal vote.

The conference did formally indorse (by Article 19 of the Convention for the Peaceful Adjustment of International Differences) the introduction of obligatory arbitration for certain classes of cases in separate treaties contracted by the individual states; and the large number and the success of such treaties which had recently been contracted were made very prominent in the conference's discussions.

The famous Article 27 (of the above-named convention), which made it the *duty* of the signatory powers

to remind the parties to a dispute that the Permanent Court of Arbitration is open to them, was also advocated and welcomed as a step in the direction of obligatory arbitration; while the exponent of Germany's powerful opposition to a general treaty of obligatory arbitration said that when the Permanent Court should be put in operation, the opportune moment might come when, after experiments between separate nations, a list of cases could be agreed upon obligatory for all.

The impulse of the first conference towards obligatory arbitration is shown by the fact that after the adjournment of the conference the German government devoted itself to a profound study of obligatory arbitration, and adopted several treaties providing for it, and at the second conference announced its entire conversion to a belief in its efficacy and desirability in so far as treaties between separate nations are concerned.

This impulse is shown by the additional fact that various other countries, great and small, "have made haste," to quote Mr. Choate's speech in the Conference of 1907, "to interchange with other individual nations agreements to settle the very questions for which arbitration was recognized by the last conference as the most efficacious and equitable remedy, by that peaceful method instead of by a resort to war. I believe that some thirty treaties have been thus exchanged among the nations of Europe alone, all substantially to the same purport and effect."

And Baron von Bieberstein, of Germany, said in the second conference: "In the course of our debates the fortunate fact has been mentioned that a long series of other treaties of obligatory arbitration have been con-

cluded between various states. This is genuine progress, and the credit of it is due, incontestably, to the first Peace Conference."

2. *The Forcible Collection of Debts*

The only class of debts, for whose collection obligatory arbitration was proposed in the first conference, was that class which arises from pecuniary damages suffered by one state or its citizens as the result of the illegal action or negligence of another state or its citizens.

It was recognized that since disputes having to do with such damages have formed the large majority of the cases submitted to arbitration they are especially suitable for submission to obligatory arbitration. Such disposition was provided for them by unanimous vote of a committee of the first conference, and by a vote of thirty-one to eight in a commission of the second conference. But in both cases this agreement failed when the other parts of the obligatory arbitration programme were discarded.[1]

b. The Conference of 1907

I. ARMAMENTS

The Russian government omitted the subject of the limitation of armaments from the programme of the second conference, and several other powers made a determined effort to prevent its being introduced

[1] The arbitration of contract debts was regarded, in the second conference, as different from, or a different kind of, obligatory arbitration, and was made the subject of an international agreement.

for discussion. But the conference as a whole determined to regard it, as Secretary Root instructed the United States delegation to regard it, as "unfinished business."

Accordingly, the importance of restricting the increase of armaments was again impressed upon the representatives of the nations; again the delegations of several great powers expressed the sympathy of their people with the general proposition; and again the governments were urged to enter upon a thorough study of the ways and means of finding a practical plan of limitation, and of securing international agreement to adopt it; while for the first time in the presence of the representatives of all the nations, an *inductive* argument for limitation was made on the basis of a five years concrete experiment on the part of two important republics of the New World (Argentina and Chili).

In furtherance of the desire expressed by the conference that the question of armaments shall be subjected to a thorough study, the International Peace Congress, at its session of 1907 in Munich, requested the International Peace Bureau at Berne to secure the appointment of committees to initiate that study. The Bureau, through its representatives in the various nations, has already created a number of representative committees in the principal countries of both hemispheres with the duty of studying thoroughly and impartially the whole armament question, of laying the results of their study before the governments and the public, and of procuring as soon as possible the meeting of an international conference charged with the sole duty of solving this knotty problem.

II. WARFARE ON THE SEA

1. *The Private Property of Belligerents*

The "American idea" of exempting the private property of belligerents from capture in time of naval war, was again presented to the nations by America's first delegate in a profoundly impressive address. After a discussion of it which lasted three weeks and which showed the strength of the arguments advanced in its favor and the weakness of those opposed to it, twenty-one of the forty-four nations represented cast their votes for its adoption and only eleven voted against it. The eight "large powers" were evenly divided on the question, and this fact, rather than the negative vote, abstention, or absence of nineteen of the "small powers," was the chief reason why the American delegation decided not to press the matter in a plenary session of the conference, but to leave it where the commission had brought it.

"There it was left," says Mr. Choate,[1] "either for these twenty-two[2] nations to agree, as they may agree, to a treaty between themselves, for the practical establishment of the doctrine between them in case they engage in war, or for action by a further conference to be held in the course of seven or eight years. So there, as it seems to me, was very great progress made. We do not stand any more where we did at the beginning of the conference, nobody assenting to it but ourselves, but twenty-two nations of greater or less importance pledged to the proposition which makes so strongly for peace."

[1] In an address before the New York State Bar Association, January 24, 1908.

[2] Mr. Choate states the number of affirmative votes to be twenty-two, and it may be that Chili, who abstained from the first vote, or one of the eleven absentees, later asked to be recorded in favor of the proposition; but the official record gives the number, and list, of the affirmative votes as twenty-one. See note, page 138.

It may be noted, also, that the favorable attitude of a large section of the conference towards the exemption of merchant ships and cargoes from capture made easier the path to success of the propositions to accord merchant ships in hostile ports a delay of favor before capture, to treat the crews of captured merchant ships with especial leniency, and to exempt from capture mail and ships engaged in fishing or in scientific, charitable, or religious missions.

2. *Blockade*

An attempt was made by several states of Continental Europe to restrict "effective blockades" to those which are maintained by naval forces stationed in such a way as to create an evident danger to ships which desire to attempt a passage, and to restrict the capture of such ships to the moment when they are attempting to break the established lines. But the British contention that cruisers and submarine mines are proper means of enforcing a blockade, and the American insistence that a ship which sets sails for a blockaded port, after the blockade has been duly announced, may be seized beyond the established lines, prevented the attempt at restriction from being successful.

The conference made no direct reference of the subject of blockade to the consideration of the next conference; but it was doubtless meant to be included in its reference to that body of the laws and customs of maritime warfare.

3. *Contraband of War*

The British proposition to abolish the principle of contraband of war, the Brazilian proposition to abolish

the distinction between absolute and conditional contraband, and the German, French, and American propositions to define more clearly the meaning and liability of absolute and conditional contraband, all failed of adoption.

But the British proposition, at first marvelled at because of its radical character, received a vote of twenty-six for, five against, and four abstentions. Four of the five negative votes were cast by "great powers," while Japan, another of the eight great powers, abstained. Three of the eight great powers voted for the proposition, and twenty-three of the other nations united with them in support of this radical measure; hence it is probable that when the subject comes up in the next conference, at least a strict definition of absolute and conditional contraband will be agreed upon.

4. *The Destruction of Neutral Prizes*

The proposition to secure a prohibition of the destruction of neutral prizes, and to require every neutral prize either to be taken before a prize court or released, failed of adoption, and was referred to the decision of the next conference. An amendment to this proposition, namely, that neutral powers be permitted to receive within their harbors both belligerent and neutral prizes, was adopted; and this permission will probably result in saving many neutral prizes from destruction.

5. *The Laws and Customs of Naval Warfare*

The attempt to apply to naval warfare the remarkable code of laws and customs adopted by the Conference

of 1899 for the regulation of warfare upon land did not result in the adoption of a code of maritime law. But it did result in a valuable report upon the applicability of the code of 1899 to naval warfare, and in the twofold desire, passed unanimously by the conference, that the question be referred to the next conference and that meanwhile the powers shall apply the code of 1899 to naval warfare as far as possible.

III. ARBITRATION

1. *International Commissions of Inquiry*

The attempts, first, to make it the *duty* of the powers to call the attention of nations in dispute to the desirability of appointing commissions to inquire into the dispute; and, second, to induce the powers to agree to establish international commissions of inquiry, instead of merely declaring that they judged their establishment to be useful, failed of achievement. On the other hand, the powers agreed that the establishment of such commissions is both useful *and desirable*, and they adopted an improved code of procedure for such commissions when established.

2. *Obligatory Arbitration*

The attempt to apply the principle of obligatory arbitration in a general treaty between all the nations did not succeed. It gave rise to a prolonged and extraordinary debate, in the course of which it became evident that the Dominican proposition to establish unrestricted

obligatory arbitration was premature, but that the nations were unanimous in expressing an ardent desire for restricted obligatory arbitration in *some* form, either in the form of a general treaty between all the nations, or in that of separate treaties between pairs of nations, and either in the form of a treaty specifying a list of definite classes of disputes, or in that of a treaty providing for the arbitration of all disputes with certain specified exceptions.

The American proposition of obligatory arbitration for judicial disputes and those relating to the interpretation and application of treaties, with the exception of those involving vital interests, independence, and honor, and the interests of third parties, secured an affirmative vote of thirty-five to nine. The Portuguese proposition of obligatory arbitration for *some* list of cases secured an affirmative vote of thirty-three to eleven; and obligatory arbitration for the *proposed* list of cases secured an affirmative vote of thirty-one to thirteen.

In view of the lack of unanimity revealed by the debate and the above-mentioned votes, the conference did not adopt any definite measure providing for obligatory arbitration in any form. But it did adopt by a vote of forty-one ayes and three abstentions,[1] a recognition of obligatory arbitration in principle; a declaration that certain differences, and especially those relating to the interpretation and application of international treaties, are capable of being submitted to obligatory arbitration without any restriction whatever; and an assertion that the diversities of opinion revealed in the long debate did not exceed the bounds of a juristic controversy.

[1] One of the three delegations which abstained was that of the United States, the prime advocate of the proposition for obligatory arbitration. See page 348.

It is also noteworthy that the German and Austrian delegations, which led the opposition to the proposed plans for obligatory arbitration, did so for the expressed reason that these plans, if adopted, would injure the progress of obligatory arbitration, and that they were among the foremost and most emphatic advocates of obligatory arbitration, in the form of separate treaties between pairs of nations, as a means of settling international disputes.

The United States delegation, in its report to the government, comments on this attempt and its result as follows:

"It may be admitted that the establishment of the principle of obligatory arbitration is an advance. It is not, however, the great advance so earnestly desired; for a concrete treaty embodying the principle of obligatory arbitration would have been infinitely more valuable than the declaration of obligatory arbitration, however solemnly made."

B. ACHIEVEMENTS

The accomplished facts of the two conferences, or the questions which were proposed, discussed, and answered in the form of an international agreement, are to be found in the "conventions" and "declarations" adopted by the conferences, signed by the delegations, and, when necessary, ratified by the governments.

In most cases, governmental ratification was not necessary after the duly qualified signatures were affixed; but in some cases, as in that of the United States, ratification was necessary on the part of more than one branch of the government. For example, of the three conventions and three declarations adopted by the Conference of 1899, the American delegation signed and

the United States Senate ratified three conventions and one declaration; of the thirteen conventions and one declaration adopted by the Conference of 1907, the American delegation signed ten conventions and one declaration, while the United States Senate ratified nine conventions and one declaration.

Although, in theory, a nation is bound only by those agreements adopted by the two conferences which have been signed by its delegation, representing the executive, and ratified by the legislative branch of the government, where the latter is necessary, still in practice it has been shown that it is only a very bold and hardened government indeed which will continue long to resist the international public opinion of the civilized world and to resort to measures condemned by the Peace Conferences. Noteworthy illustrations of the potency of international public opinion are the action of Great Britain in accepting the prohibition of "dum dum" bullets and asphyxiating bombs, that of Spain and Mexico in renouncing the practice of privateering, that of Switzerland and China in ratifying the laws and customs of warfare, and that of the Latin American republics in adhering to all of the acts of the Conference of 1899.

Secretary John Hay, in his instructions to the United States delegation to the first conference, said: "The proposed conference promises to offer an opportunity thus far unequaled in the history of the world for initiating a series of negotiations that may lead to important practical results." That the conference utilized this opportunity to a remarkable degree is the verdict of history. Its achievements are summarized briefly in the following pages.

a. The Conference of 1899

I. WARFARE IN THE AIR

A prohibition was placed for five years upon the hurling of projectiles from balloons or by other new analogous means. The prohibition was at first made a permanent one, but on the motion of Captain Crozier, of the United States, it was reduced to the term of five years.

Humanity would be the gainer, it was argued, from this measure, first, because warfare could not be waged from or in the air for at least five years; and second, because within five years air war ships would be given the opportunity of developing into so perfect a fighting machine that it might diminish the duration, the evils, and the expenses of wars. Doubt may be entertained as to the consistency of the two parts of this argument; but there can be no doubt that the conference was sincere in its desire to emphasize, by the passage of this prohibition, the modern determination that the horrors of warfare shall be reduced to the minimum, and that the means of making war shall not be unrestrictedly and irresponsibly increased.

II. WARFARE ON THE SEA

In taking up a consideration of this topic, the Conference of 1899 entered upon an almost untraversed realm. For more than a century repeated attempts had been made to establish in international law certain principles for the regulation of warfare on the sea; but the only

fruits of those attempts were the four articles of the Declaration of Paris of 1856, which were only partially accepted. In 1899 there were only two achievements added to the previous ones; but these were almost universally accepted, and one of them was of far-reaching importance.

1. *Asphyxiating Gases*

The conference adopted the agreement to abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases. Captain Mahan, of the United States, opposed this agreement, and the American and British delegations were the only ones of the twenty-six which refused to sign it. The British delegation announced its adhesion to it, in the Conference of 1907, and the Latin American republics did the same.

This action on the part of forty-three out of forty-four of the world's governments is probably the reason why human ingenuity has not been devoted more conspicuously to the invention or improvement of asphyxiating bombs; and it will doubtless prevent this particular means of warfare from being resorted to in the future.

2. *The Geneva Convention*

The ten articles adopted at the Conference of Geneva in 1868 for the purpose of applying to naval warfare the rules which had been adopted four years earlier for hospital service in warfare on the land, remained a dead letter for one generation. The Conference of 1899 then

took them up and breathed into them the breath of life. Not only was the overcoming of obstacles to their adoption in 1899 a marked triumph in diplomacy and international law, but the humanitarian efforts of the Red Cross have already resulted in unmeasured good in one great battle on the sea. In the future, upon the oceans as on the land, human kindness and medical science are to be given a chance to mitigate the savage brutalities of war.

III. WARFARE ON LAND

The Conference of Brussels of 1874 adopted a declaration concerning the laws and customs of warfare on land; but during the subsequent quarter century this declaration remained unratified. The adoption of an elaborate code, growing out of this declaration (which was itself the outgrowth of the United States Army's General Order No. 100, issued in 1863), was one of the chief triumphs of the Conference of 1899. The Geneva Convention, which was designed for and has succeeded in the *alleviation* of the sufferings caused by war, is deservedly famous; but the code of warfare adopted by the first Conference at The Hague, which was designed for and has already succeeded in the *prevention* of many of the sufferings of warfare, will probably become even more deservedly famous.

In addition to this code, the Conference of 1899 is to be credited with two other achievements in regard to warfare on land; namely, the restriction of the use of unnecessarily cruel projectiles, and a provision for the revision of the Geneva Convention of 1864.

1. *Bullets*

In accordance with the spirit of the Declaration of St. Petersburg of 1868, the Conference of 1899 adopted a prohibition of the use of bullets which expand or flatten easily in the human body, such as bullets with hard jackets which do not entirely cover the core or have incisions in them. The British and American delegations, while declaring their sympathy with the spirit of the Declaration of St. Petersburg, opposed this specific prohibition, and proposed one in more general terms. But the conference adopted the prohibition as stated by a vote of twenty-three to three. The three powers casting the negative vote were the United States, Great Britain, and Portugal. At the Conference of 1907, Great Britain and Portugal announced their adhesion to the prohibition adopted in 1899, and the Latin American republics accepted it also. The United States delegation renewed its attempt to have the prohibition made more general, but failed in it.

The American proposition in regard to bullets was apparently more drastic than the one adopted; but the military experts of Europe and South America agree that it would not abolish the use of bullets unnecessarily cruel, while the more specific rule adopted does accomplish this purpose.

2. *The Geneva Convention*

The Conference of 1899 adopted the desire (*vœu*) that a special conference should be held for the revision of the Geneva Convention of 1864. In accordance with this desire, a convention was held in Geneva during the

summer of 1906, and expanded the original ten articles into a convention of thirty-three. These additions were in the nature of additional protection to the sick, wounded, and dead found on battlefields, and to their caretakers and places of refuge.

This revised convention, although accomplished seven years after the Conference of 1899, was made possible by it, and was inspired by the same spirit. In the words of one of the German delegates to the Conference of Revision, "the Convention of Geneva and that of The Hague are sisters, destined to walk together along the path of civilization towards the triumph of justice and humanity."

3. *The Laws and Customs of Warfare on Land*

With the object of throwing the mantle of humanity over the arm of force, of restricting the cruelties of warfare by defining its rights and duties, the Conference of 1899 adopted a code containing sixty articles.

These articles admitted corps of militia and volunteers, and even a population rising *en masse* in defense of their country, as well as regular soldiers, to the rights and privileges of "belligerents," provided they respect the laws and customs of warfare. They gave generous scope to the term "prisoners of war," and provided rigorously for a treatment of them quite in accord with modern principles of imprisonment. They denied the possession of an unrestricted right by belligerents to adopt means of injuring the enemy, and prohibited the use of seven such means. They prohibited the bombardment of undefended towns and buildings, prescribed means of diminishing the

evils of bombardment of fortified places, and prohibited a resort to pillage, even after a successful assault. They restricted the scope of the term "spies," and provided that captured spies shall be tried before being punished. They protected the inviolability of bearers of flags of truce. They laid down strict regulations for the maintenance of armistice, and prescribed that capitulations should be exacted in accordance with the rules of military honor. And, finally, without acknowledging the right of conquest, they endeavored to moderate its conditions by strictly defining "occupied territory," prescribing efficiency and moderation in its government, forbidding the invader to compel the population to take an oath of allegiance to him or to take part in operations against their country, protecting the civil, religious, and property rights of the population, and by protecting public works and the property of municipalities and of religious, charitable, and educational institutions.

So valuable has this code of laws been considered by international jurists that Professor Zorn, of Germany, said that it alone would have made the Conference of 1899 a remarkable success; and Professor de Martens, of Russia, said that it will certainly be as notable as the treaty on arbitration. These estimates are due to the fact that it has replaced the old adage, "In the midst of warfare laws are silent," by the new one, "In the midst of warfare laws shall rule."

IV. ARBITRATION

The convention adopted by the Conference of 1899 for the peaceful settlement of international differences

has been called the Magna Charta of International Law; and it has been argued that just as Magna Charta was the basis of all later development of English liberty, so the convention of 1899 must ever remain the keystone of the arch of international justice. Its adoption, in the words of Baron d'Estournelles, has solemnly characterized war as a conflagration, and commissioned every responsible statesman a fireman with the prime duty of putting out the fire or preventing its spread.

Its provisions for the peaceful settlement of disputes, entirely voluntary though they are, unquestionably facilitate the avoidance of war; and its increasingly successful operation is confidently expected to result in the limitation and probably the reduction of armaments. Hence it has supplied a positive programme to the "peace movement," which no longer emphasizes solely or chiefly the evils of war, but insists upon the organization of a practical means of avoiding it. The barracks or war-ship philosophy of peace is no longer merely denounced, but it is brought into destructive competition with a peaceful philosophy of peace. The mediæval adages, "In time of peace, prepare to make war," and "If you wish for peace, prepare for war," are replaced by the modern ones, "In time of peace, prepare to make war *impossible*," and "If you wish for peace, prepare for *peace*." A court and not barracks, statesmanship instead of a war ship, are the standard raised by the arbitration convention of 1899.

It is true that since the first Peace Conference two terrible wars have occurred; but it is also true that at least two wars, possibly as terrible, have been averted by the operation of the simple means provided by the

conference, and that four important international disputes have been settled by its court of arbitration. This record, of only seven years, is full of encouragement; while the many separate treaties of arbitration, which have been largely the outgrowth of the first conference, and the impulse given to arbitration in various ways, have undoubtedly enlarged the empire of law in international relations and fortified the sentiment of international justice.

Secretary Root, in his instructions to the United States delegation to the second conference, alluded to the many separate treaties of arbitration between individual countries, and said that "this condition, which brings the subject of a general treaty for obligatory arbitration into the field of practical discussion, is undoubtedly largely due to the fact that the powers generally in the first Hague Conference committed themselves to the principle of the pacific settlement of international questions in the admirable convention for voluntary arbitration then adopted."

1. *Good Offices and Mediation*

The agreement adopted by the conference that powers in dispute would have recourse to the good offices or mediation of one or more friendly powers, before an appeal to arms, in case of any serious dispute, and as far as circumstances permit, was supplemented by the further statement that the signatory powers consider it useful that one or more powers, strangers to the dispute, should, on their own initiative, and as far as circumstances permit, offer their good offices or their mediation to the states

at variance with each other. The restriction of this agreement by the phrase, "as far as circumstances permit," was considered an unfortunate one, but was adopted because the conference did not desire to attempt more than the powers could reasonably be expected to carry out.

When the principle embodied in these agreements is compared with the former jealous resentment of any "foreign intervention" which dominated international relations before 1899, the progress made by the conference in the mere frank statement of it is apparent. But when it is recalled that, inspired by it, President Roosevelt extended the good offices of the United States government to Japan and Russia in their recent war, and that the Peace of Portsmouth, New Hampshire, was the fortunate result, the value of this feature of the convention of 1899 is greatly proven by an accomplished fact of vast historic import.

The desirability of a more frequent resort to this means of avoiding or shortening a war was emphasized in the Conference of 1907, which adopted the words, "and desirable," to the former statement that the powers consider good offices and mediation "useful." This slight addition to the phraseology of 1899 may not have directly the desired result of increasing the frequency of good offices and mediation; but it at least emphasizes the former statement that their extension, even during the course of hostilities, shall not be considered by either of the parties to the dispute as an unfriendly act. The consistent adoption of this latter view, together with the growing conviction that the interests of one are the interests of all in the family of states, will increase the frequency of this means of preventing war and insuring justice.

2. *International Commissions of Inquiry*

The statement that the powers consider the establishment of international commissions of inquiry to be a "useful" method of avoiding warfare was adopted in 1899 after a long struggle. But it was hedged about with conditional phrases as to honor, essential interests, and circumstances permitting; and in 1907 it was strengthened only by the addition of the words, "and desirable."

This statement, most moderate in its form and referring to a purely voluntary measure on the part of disputants, is a striking illustration of the importance of holding up a standard to which the wise and the honest may repair. Issued by the first conference, and made practicable by the adoption of a few simple rules of procedure, it enabled the great powers of Russia and Great Britain to settle speedily and peacefully a grave dispute which arose between them six years after the conference adjourned. The incident of the Hull Fishermen, or the Dogger Bank, was of historic importance not only as showing the influence of a simple statement of belief, but as showing also that even disputes in which "honor and essential interests" are involved may be settled by the peaceful and rational method of international commissions of inquiry.

The adoption of the wise motto, "Investigate before you fight," will inevitably result many times in proving the truth of the saying, "Investigate and you won't fight."

3. *The Permanent Court of Arbitration*

The *idea* of a permanent international court of arbitration was one of profound statesmanship; its *recommenda-*

tion to the powers would have been a long step in advance; while the actual *establishment* of it was a veritable triumph, — the crowning glory, it has been universally admitted, of the first Peace Conference.

The competence of jurisdiction conferred upon the court, and the careful arrangements made for its operation, were designed to make it the regular, though entirely voluntary, forum of international justice. The famous Article 27, which declared it to be the *duty* of the powers to remind disputants of the existence of the court and its adaptability to the peaceful solution of international disputes, was adopted for the purpose of making it the frequent, as well as the regular, means of settling difficulties before which diplomacy should fail.

The cases which have been brought before the Permanent Court have been of very great importance, but have been only four in number, while it is believed that several other cases of grave import should have been brought before it. An article was therefore adopted in 1907 providing that either disputant, without making an agreement with its opponent, or waiting for the reminder from the powers provided for in Article 27, might of its own initiative report its willingness to arbitrate to the International Bureau, which shall then inform all the powers of the fact, leaving them to perform their duty in the premises. It is confidently believed that this amendment will result in sending more, and even the most crucial of questions, to the decision of the Permanent Court, instead of to trial by battle.

The importance of the Permanent Court of Arbitration should be measured, not only by its important achievements during the few years of its existence, but also by

the estimates of its founders, — those great international statesmen who, by creating it, gave expression to the highest aspirations of their own century, and foresaw and provided for the needs of the next. President de Staal, in his final address to the conference, declared that the convention which provided for its establishment opened a new era in the domain of international law and would be called by posterity "the first international code of peace." Chevalier Descamps, in reporting the work of the committee to the conference, said of its importance:

"When one seeks through the history of international law, — from the day when that law was placed upon firm foundations by the man of genius to whom America has recently rendered brilliant homage on his native soil, — when one seeks some page comparable with that which the Conference of The Hague has just written, it seems difficult to find one more fruitful."

Secretary John Hay, in his instructions to the United States delegation to the first conference, expressed a sentiment which, though anticipating the Permanent Court of Arbitration, will forever remain an illuminating comment upon its importance as well as upon that of all similar agencies of international law and justice.

"The duty of sovereign states," he wrote, "to promote international justice by all wise and effective means is only secondary to the fundamental necessity of preserving their own existence. Next in importance to their independence is the great fact of their interdependence. Nothing can secure for human government and for the authority of law which it represents so deep a respect and so firm a loyalty as the spectacle of sovereign and independent states, whose duty it is to prescribe the rules of justice and impose penalties upon the lawless, bowing with reverence before the august supremacy of those principles of right which give to law its eternal foundation."

b. The Conference of 1907

The difficulty, the impossibility perhaps, of forming at present a just estimate of the historic importance of so recent an assembly as the second Peace Conference, needs no argument with students of history. All that will be attempted here is to suggest a few considerations prerequisite to such an estimate, to quote the opinion of a few men who participated prominently in the work of the conference itself, and to summarize briefly its achievements.

Students of these achievements should not forget that the growth of institutions, even national ones, is necessarily and desirably slow; for not only must national prejudices be overcome and national interests reconciled, in the making of international agreements, but these agreements, to be binding and fruitful, must be neither forced nor reluctant. It should not be forgotten, either, that no human assembly can accomplish all that ought to be done, or all that is expected of it; and that by emphasizing unduly its failures, its real successes may be unduly minimized.

In judging of the work of this "parliament of man," we should remember the slow and often disappointing results of the parliaments of nations. We should remember, too, that the international assembly, unlike national legislatures, was composed of representatives of every kindred, tongue, and nation; and that the delegates, though possibly in advance of the political and moral standards of their own people, were bound by strict instructions from governments which necessarily

reflected the diverse institutions and ideals of their respective nations. It should be remembered, also, that in an assembly of the representatives of sovereign and independent states, the rule of the majority and the enforcement of parliamentary law were subordinated to the necessity of practical unanimity and of voluntary agreement.

In view of these limitations and obstacles, the achievements of the second Peace Conference were far more than could have been reasonably expected; while taken by themselves they afford a cause of present gratification and a rich promise of increasing fruitfulness.

I. WARFARE IN THE AIR

The prohibition upon the hurling of projectiles from balloons, which was imposed by the first conference, was renewed by the second, and increased from the former duration of five years to that of "the end of the next conference."

Whatever may be the final result of international legislation on this matter, the next seven years are to be saved from the horrors of a warfare from on high, in which the elements of uncertainty and the lack of adequate control of engines of destruction so largely prevail.

One of the laws and customs of warfare on land, adopted in 1907, was a permanent prohibition of the bombardment of undefended towns and buildings by artillery, by the launching of projectiles or explosives from balloons, or by any means whatever.

II. WARFARE ON THE SEA

The regulation of warfare on the sea was a task full of difficulties both technical and delicate. The questions discussed were burning ones which recent bitter events had made prominent, and every one had to be considered from the point of view of both belligerent and neutral, while the interests of both continental and maritime powers had to be reconciled.

The Congress of Paris of 1856 and the Peace Conference of 1899, with their handful of rules, were the only precursors of the second conference in the vast task of regulating naval warfare. To the four or five former rules, the second conference added a full score; and its deliberations upon questions still unsolved will undoubtedly become the basis of the future solutions of several other knotty problems. In the words of the reporter of the IV Commission, which accomplished so much of this difficult labor: "The result achieved to-day is only the corner stone of the edifice universally expected and desired, whose completion can not be hoped for in a few months. Devotion to law and the spirit of equity and conciliation, by which the labors of this commission have not ceased to be inspired, are the best gauge of the future."

The Russian delegates, Professor de Martens, president of the IV Commission, and M. Nelidow, president of the conference, reflected the importance attached by their country to the solution of the naval questions which the Russo-Japanese War had pressed forward, by declaring that praise or criticism of the conference would be equivalent to praise or criticism of the code of maritime law

which it adopted, since the two were indissolubly bound together;[1] and that the code of maritime law was even more important than what had been accomplished for arbitration.[2]

The International Prize Court, which is classed in this book with the other international courts under the section of arbitration, may also rightly be looked upon as a triumph within the domain of the regulation of warfare on the sea. And this court Sir Edward Fry, of Great Britain, declared to be the most remarkable of all the measures adopted by the conference, "because," he explained, "this is the first time in the history of the world that there has been organized a truly international *court.* International law to-day," he continued, "is nothing else than a chaos of opinions which are often contradictory and of decisions of national courts based on national laws. We hope to see growing up little by little around this court a system of laws truly international which shall owe its existence solely to the principles of equity and justice, and which will therefore deserve not only the admiration of the world, but the respect and obedience of civilized nations."[3] This system of international prize law, the outgrowth of the prize court established by the second conference, will also look back to that conference as its primal source.

1. *Submarine Mines*

The prohibition of the use of unanchored mines, unless constructed in such manner as to become harmless within

[1] Professor de Martens, in his final address to the IV Commission.
[2] President Nelidow, in his final address to the conference.
[3] Sir Edward Fry, in his address to the conference at its last plenary session.

one hour after their control has been lost; the prohibition of the use of anchored mines which do not become harmless as soon as they break their cables; the prohibition of the use of automobile torpedoes which do not become harmless when they have missed their aim; the prohibition of the placing of mines along the coasts and in front of the ports of the enemy, with the sole purpose of intercepting commerce; the requirement that every precaution be taken to protect peaceful navigation against submarine mines; and the agreement that belligerents shall cause them to become harmless after a limited time by removing them, or guarding them, or indicating the dangerous regions and notifying the other powers of them; — such were the important regulations prescribed by the second conference for the use of submarine contact mines and torpedoes.

In view of the great destruction to neutral commerce caused in the past by these "demons of the sea," and in view of the fact that this was the first attempt to regulate their use by belligerents and neutrals alike, the achievement of the conference in this respect was of great importance. It is true that the British delegation gave public expression to its keen disappointment that the rules did not go still farther and prohibit the use, under *any* conditions, of unanchored mines, and restrict the area of anchored mines. But in the regulations adopted, a very long step was taken; and the earnest solicitude of the greatest maritime power of the world in regard to the matter will be a potent force in developing the existing rules into still more drastic ones. And meanwhile, the public acknowledgment, by Germany's first delegate, of the belligerent's heavy responsibility to neutrals in the

placing of mines, will be enforced; while his assertion that conscience, good sense, and the sentiment of duty imposed by the principles of humanity will form an even more effective guarantee against the abuses of mines than international law itself, will be impressed upon belligerent governments and the admirals whom they instruct.

2. *Naval Bombardment*

Bombardment by naval forces was regulated by a series of important rules. The bombardment of undefended ports, towns, villages, dwellings, or buildings, was prohibited. Bombardment for the enforcement of a money ransom was prohibited, as was also pillage, even in the case of towns captured by assault. The right of destroying by bombardment the military and naval equipment in undefended ports, etc., was restricted by the proviso that the local authorities should first be given a reasonable time in which to perform the destruction themselves; if military necessities demand immediate bombardment, and no other means can be found to destroy such equipment, then the naval force may bombard them, but every precaution must be taken to protect the port itself. The right of bombarding an undefended port, etc., to enforce a requisition of stores or provisions was restricted by the proviso that such stores must be in accord with the resources of the port requisitioned, must be sanctioned by the commandant of the naval force, and must be paid for, in cash when possible, or vouched for by written receipts.

The conference did not define precisely what it meant by "undefended" ports, etc., but it acquiesced in the

statement that an unfortified town situated near a fortified coast is an undefended town; and it voted that a port before which automatic submarine mines of contact are anchored is not to be considered subject to bombardment because of that fact.

The importance of these rules has been minimized because they prevent only the bombardment of, and not the landing of troops in, undefended ports. But this is to condemn the present because it is not the future. The importance of the rules as far as they go is evident. They are calculated to save anxiety, suffering, the loss of life and property; they restrict naval warfare, as has been the case with land warfare, to contests between armed forces, and exempt non-combatants and the defenseless from its horrors; and they will probably induce governments to avoid the waste of money in the erection of forts which not only become speedily antiquated, with improvements in naval armaments, but which may draw the fire of those armaments upon sea-coast towns and peoples.

§ 3. *Merchant Ships transformed into Cruisers*

The danger that the practice of transforming merchant ships into cruisers in time of war might restore the old system of privateering which the Declaration of Paris of 1856 abolished, was recognized by the Conference of 1907, which regulated it by a half-dozen rules. These rules provide that a transformed merchant ship may acquire the rights and privileges of war ships only when placed under the immediate control and responsibility of the state whose flag it flies, with a commander duly

commissioned by the state, and a crew under military discipline; and when bearing the distinctive external marks of the war ships of its nation. These ships must conform to the laws and customs of war; and their transformation must be published in the state's official list of war ships.

The object and result of these rules will be to make piracy more difficult, to restrict privateering,[1] and to bring all naval combats within the rules adopted for the humanizing of warfare.

4. *Restrictions on the Right of Capture*

Although the American proposition to exempt private property from capture in naval warfare was not adopted by the conference, several restrictions on this right of capture were adopted.

Merchant ships of belligerents, except those evidently intended for transformation into war ships, cannot be confiscated, whether they be in the enemy's ports on the outbreak of hostilities, or enter them after that event in ignorance of it, or are captured on the high seas in ignorance of the war. They must be given a sufficient warning to depart, in the first two cases, and if they do not or can not heed this warning, they may only be detained until the end of the war, or requisitioned on payment of compensation; and in the third case, they may be detained until the end of the war, or requisitioned or even destroyed on payment of compensation. The same rules apply to

[1] In accordance with the policy of the United States in regard to privateering and the capture of private property in naval warfare, the United States delegation did not sign, and the United States Senate did not ratify, this convention.

cargoes on board the above three classes of merchant ships.[1]

The officers and crews of captured merchant ships are not to be made prisoners of war, whether they are citizens of a neutral or of a belligerent state, provided they sign a promise in writing that they will not take part in the war.[2]

Boats used exclusively for fishing purposes, and all ships engaged upon scientific, religious, or philanthropic missions, were exempted from capture.

The postal correspondence of both neutrals and belligerents was made inviolable, and must be forwarded with the least possible delay in case the ship conveying it is detained or captured.

These various rules are all in the direction of *canalizing* warfare, — of restricting its wastes and injuries to definite channels, and of protecting from its ravages the normal world of peace and commerce.

5. *Belligerents in Neutral Waters*

The absolute sovereignty of neutral states, and its inviolability during warfare, is made the basis of the rules adopted for the conduct of belligerents in neutral waters. These rules[3] have to do with the entrance and stay, the repairs, revictualing, and recoaling, the number

[1] The United States delegation and the Senate rejected this convention because of the American demand that *all* merchant ships and cargoes of belligerents, except in the case of contraband or blockade, shall be exempt from capture.

[2] Neutral members of the crew are required to make no promise; neutral officers must promise not to serve on an enemy ship while the war lasts; belligerent officers and members of the crew must promise not to take part in any warlike operations.

[3] See pages 149–157.

and departure, of belligerent war ships in neutral waters; they strictly forbid military preparations or operations within neutral waters, on the part of belligerents; and they authorize and expect, and generally require, the neutral states to enforce these rules by every means in their power, asserting that such enforcement cannot be looked upon by either belligerent as in any sense an unfriendly act.

The United States delegation did not sign the convention which embodied these rules; but the United States Senate has advised and consented to the adherence of the United States to it under two conditions: first, that the rule be excluded which provides that a neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a prize court, etc. (Article 23); and second, that it be understood that the last clause of Article 3 implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction.

The adoption of the rules regulating the conduct of belligerents in neutral waters will prevent the recurrence of many exasperating and dangerous complications between neutrals and belligerents; and they assert in unmistakable terms the absolute sovereignty of neutral states in their relations with belligerents, and their inviolable right to be left unmolested in their normal condition of peace as the ravages of war sweep past them.

The rules adopted did not cover all the questions which may arise between neutrals and belligerents, in naval warfare, but the convention includes the rule that the

contracting powers shall communicate to each other in due course all laws, proclamations, and other enactments regulating in their respective countries the status of belligerent war ships in their ports and waters. In this way it is hoped that complete national codes of laws shall be adopted, which shall approximate uniformity and become the basis of a definite system of international law covering every aspect of this important question.

III. WARFARE ON LAND

The great achievement of the Conference of 1899, in relation to warfare on land, was a codification of its laws and customs in regard to operations on the theater of war; the great achievement of the Conference of 1907, in relation to warfare on land, was the codification of its laws and customs as regards neutral states and citizens.

Like the convention relating to the conduct of belligerents in neutral waters, the convention relating to neutrals on land did not attempt to provide for all possible cases of misunderstanding and dispute; but it took up the subject from the point of view both of neutral states and of neutral residents of belligerent territory, and made decided progress with both of these aspects of a knotty problem. It revised also the laws and customs of warfare on land, adopted in 1899, in a number of important particulars.

1. *The Rights and Duties of Neutrals*

As in the case of the convention relating to belligerents in neutral waters, so in the convention relating to the

rights and duties of neutrals on land, the inviolability of neutral states is made the basis of the articles adopted.

These articles forbid belligerents to perform certain acts to their own military advantage on the territory of a neutral state, and they fix carefully the responsibility of the neutral state in preventing the performance of those acts; they define the relation of a neutral state towards belligerent soldiers, invalids, and wounded; they define and protect the rights of neutrals residing within the territory of belligerents; and they protect the property of railway companies belonging to neutrals but operating within belligerent territory. The conference also adopted two desires (*vœux*) that the authorities of belligerent states shall make it their special duty to protect peaceful industrial relations with neutrals, and that the powers shall endeavor to establish by separate treaties uniform regulations concerning the military obligations exacted of resident aliens.

The importance of the above rules lies in the twofold fact that they lessen the anxieties and hardships of neutrals residing within belligerent territory, and, by removing some vexed uncertainties as to the relations between neutral and belligerent states, they diminish the danger of warfare between them and, at the same time, help to preserve intact the normal peaceful intercourse of trade and commerce between their citizens.

2. *The Laws and Customs of Warfare on Land*

The following noteworthy rules were added in 1907 to the important code of 1899: a declaration of war, stating its causes, or an ultimatum with a conditional declaration

of war, must be issued before hostilities are commenced, and definite notice to neutrals of the state of war is required; militia corps and volunteers, to be considered "belligerents," must bear arms openly, as well as respect the laws and customs of war; prisoners of war may be confined only as an indispensable measure of safety, and only for the duration of the circumstances which necessitate their confinement; bureaus of information were charged with the duty of ascertaining additional details concerning prisoners, and of forwarding their record to their government after the conclusion of peace; officers were exempted from the rule permitting belligerents to employ their prisoners of war as laborers, and it was agreed that their captors should pay them a salary equal to that paid to officers of the same rank in the enemy's army; the repudiation, by belligerent governments, of the private claims, or "rights and actions at law," of the subjects of hostile powers was prohibited; belligerents were forbidden to compel the subjects of the enemy to take part in the operations of the war directed against their country, even when they have been in the belligerent's service before the war commenced; a permanent prohibition was placed on the bombardment of undefended towns and buildings, by artillery, by the launching of projectiles or explosives from balloons, or by any means whatever; in the bombardment of defended towns, historical monuments were added to the list of buildings to be protected; a belligerent was forbidden to compel the population of an occupied territory to give information concerning the army of the other belligerent or its means of defense; the rights of private property in occupied territory were strengthened by the rules that receipts

given for contributions in kind shall be redeemed for money as soon as possible, and that all means, on land and water and in the air, of transmitting news and transporting persons or things, except those regulated by maritime law, shall not be confiscated by the invader, but only used for his military necessities and be restored and compensated for on the conclusion of peace.

The importance of the above rules lies in the fact that they are another step in the humanizing of war and in the protection of peace and prosperity from its ravages.

IV. ARBITRATION

As the first conference is historically important chiefly for the progress which it made in the advancement of the principle and practice of voluntary international arbitration, so the chief historical importance of the second conference lies in its advancement of the principle and practice of both obligatory and voluntary international arbitration. The latter's work in furtherance of the principle of obligatory arbitration has already been estimated under the head of "attempts";[1] its promotion of the practice of obligatory arbitration will be summarized in connection with the forcible collection of debts and the International Prize Court; its achievements in the field of voluntary arbitration are associated with its system of arbitral procedure for the Permanent Court of Arbitration and its Court of Arbitral Justice.

Popular expectations in regard to the first conference ran highest in the direction of the limitation of armaments; these expectations were disappointed, but the conference

[1] See pages 461–463.

gave to the world unhoped for, almost undreamed of, achievements in the realm of arbitration. The second conference was anticipated in popular interest chiefly because of what was hoped it would accomplish in the direction of arbitration; the highest of these hopes were disappointed, but the field of future harvests was surveyed and plowed and planted, while the harvest actually gleaned is sufficiently good and bountiful to encourage and rejoice greatly all true patient lovers of international peace.

61. *The Forcible Collection of Debts*

The agreement to refrain from the use of armed force for the collection of contractual debts, unless arbitration of them should fail, was one of the most important achievements of the second conference, and one of the greatest triumphs in the history of diplomacy.

It will remove one cause of uncertainty, anxiety, and restriction from the paths of neutral commerce; it will promote financial prudence and financial honesty on the part of governments; it will protect the limited resources of undeveloped countries from the extravagant demands of unscrupulous foreign "promoters"; it will relieve state departments of the vast labor and expense of collecting doubtful claims; it will relieve the United States of the burden of defending financial dishonesty, and of unduly interfering with the domestic affairs of other nations, in its determination to enforce the Monroe Doctrine; it will be one more strong reason for the limitation of armaments, especially on the part of the Latin American states; it will do away with a prolific source

of threats, "peaceful blockades," and warfare between nations; and it is a long step towards general obligatory arbitration.

International honesty, justice, industry, and peace have all received a powerful impulse from the adoption of this "Porter Proposition," which of itself alone has made the second Peace Conference well worth the time, labor, and expense which it involved.

2. *Arbitral Procedure*

The few rules of 1899 for the procedure of international commissions of inquiry were so developed and increased in 1907 that a complete code of ready-made rules is available at all times for the guidance of those commissions, no matter how suddenly they may be called upon to operate, or how important and delicate the questions which they may be asked to investigate. These rules[1] are based upon experience in the case of the Hull Fishermen, or the Dogger Bank, and are confidently expected to facilitate a resort to commissions of inquiry as a means of avoiding warfare.

The code of arbitral procedure adopted in 1899 for the Permanent Court of Arbitration was so amended and developed in 1907 that the chances of uncertainty and delay in the arbitration of international differences were lessened, the expenses of the procedure were diminished, and a further advance was made in the direction of raising international arbitration from the plane of diplomacy to that of genuine judicature. The measures adopted for facilitating an agreement upon the compromise, that *sine qua non* of arbitration, and the five articles pro-

[1] See pages 291–295.

viding for a "summary procedure of arbitration," [1] were designed to make more easy and frequent a resort to the Permanent Court for the settlement of international difficulties.

3. *The Court of Arbitral Justice*

The action of the conference in regard to the Court of Arbitral Justice, which was proposed and championed by the United States delegation, was considered by many its most conspicuous failure, by some its most bitter disappointment, and by a few its most promising achievement. The verdict of future events must be awaited for assured condemnation or vindication of that action; but a few reasons may be suggested here for placing it, and for placing it high, upon the list of the conference's achievements.

The potency of great ideas in human history needs not to be argued; nor does the statement that the idea of establishing a genuine court as the arbiter of international differences is a great, a *bahn-brechende*, idea. Now this idea, although abandoned as impracticable by the first conference, was introduced in the second conference only eight years later, explained, attacked, defended, and almost unanimously accepted as both desirable and practicable. Some of the ablest of international jurists collaborated in the task of advocating that idea and giving to it form and substance. The concrete results of their labor were adopted by the conference and are published, not as a vermiform appendix, but as an essential annex to the Final Act.

[1] See pages 402–409.

Not only will the idea of such a court henceforth stand behind the wrong of warfare, but it will inevitably rule the future. The court itself, fashioned and wrought out in all but one of its details, needs only an agreement as to the appointment of its judges; and when this breath of life is breathed into it by *any* number of the nations, it will at once spring into beneficent activity. Its operation does not require unanimity among the nations, as did so many other features of the Final Act of The Hague; nor does it require even a two-thirds acceptance, as did the Constitution of the United States; but the moment when two or more powers agree upon the appointment of its judges, it will open its doors for the pacification of disputes. Even though constituted by only two powers, it will be known as the Court of Arbitral Justice at The Hague, and, like a city set upon a hill, it will eventually draw to it all nations seeking to escape the evils of warfare.

It was greatly to be desired, of course, and it is still greatly to be desired, that its operation should come as the result of unanimous agreement. But even from this point of view it should be noted that the conference voted unanimously the recommendation that the governments should adopt, not *some* court, but this particular Court of Arbitral Justice, and put it in operation as soon as they could agree upon the choice of its judges.

To inhabitants of the Western World, also, the hope of a court based upon unanimous support is strengthened by the recent establishment of a court of arbitral justice by the republics of Central America. This hope of our Western World has been well expressed by President Roosevelt who said of the method of choosing the judges: "This

remaining unsettled question is plainly one which time and good temper will solve";[1] by Ambassador Choate and Secretary Hale, who said, in their report to the United States government, in regard to the same question: "A little time, a little patience, and the great work is accomplished"; and by Dr. Scott, who writes: "I believe you will search in vain for any work of a more far-reaching nature accomplished within the past centuries. The dream of Henry IV, the hope of William Penn, both of whom prepared projects for a court of nations, seem, if not wholly to have been realized, within the very grasp of our generation."[2]

4. *The International Prize Court*

The establishment of an international high court of justice functioning as a court of appeal from national courts in cases of merchant ships captured in naval war, was, for several reasons, one of the second conference's most important achievements. It is the first truly international *court* established in the history of the world. Its decisions will be a fruitful source of maritime *law*. It will remove the capture of merchant ships still farther from the plane of piracy, by permitting the decision of a national prize court to be supplemented by that of an international one. It will modify the presumably partial decisions of national courts by an appeal to the probably less partial decisions of an international one, and will thereby emphasize forcefully the principle in international, as in national law, that a suitor shall not be judge in his own cause. It will remove a fertile cause of disputes between the belligerents themselves, and between them

[1] The President's message to the Congress, December, 1907.
[2] James Brown Scott, "The Work of the Second Hague Conference," a pamphlet published by the Association for International Conciliation.

and neutral nations, and will thereby lessen the bitterness of wars once begun and prevent the outbreak of others. The unanimous adoption (with the exception of Brazil's vote) of its method of selecting judges, will pave the way for the solution of the same question in regard to the Court of Arbitral Justice. And, by supplying in time of war a regular adjudication of one very important and delicate class of international differences, it will serve as an inductive argument and give a strong impulse to the establishment of the Court of Arbitral Justice for the adjudication of all classes of international differences in time of peace.[1]

C. INDIRECT RESULTS

The indirect results of great events in the world's history are often of greater, because more lasting and far-reaching, importance than are their direct and measurable ones. An eminent historian, the Duke de Broglie, has said: "We live in a time when we must take as much and more account of the moral effect of a great measure than of its material and immediate results." This would seem to be especially true of conferences designed to promote the world's peace. Just as the hands on the clock of time cannot be turned permanently backward, so nations cannot be permanently checked in their advance towards visions which their eyes have once clearly seen and their minds have begun to appreciate.

[1] Although the International Prize Court was based on the compromises proposed by Mr. Choate, and the convention establishing it was signed by the United States delegation, the United States Senate has not yet ratified it. The Senate committee's refusal to report it at the last session was due to the constitutional objection that no foreign jurisdiction can be established or recognized by the United States Government; but it is entirely probable that this objection will be found to be a mistaken one, and that the convention will be ratified at the Senate's next session.

All the indirect results of the two Peace Conferences, all the visions which they have summoned above the international horizon, are too numerous to be mentioned here, and they can be fully appreciated only with the progress of the nations towards them. But there are two indirect results of these conferences which, because of their prime and immediate importance, should be mentioned briefly here. These are, first, their promotion of what may be called in Tennyson's phrase, "the federation of the world"; and, second, their preparation for a third Peace Conference at The Hague.

I. THE FEDERATION OF THE WORLD

The above phrase has been selected as the title of this section, rather than its companion one, which is quoted with equal frequency, "the Parliament of Man." Of course, the meeting and work of the two Peace Conferences constitute in no true modern political sense a *parliament*. The universality of both phrases, it is true, was closely approximated by them. The one hundred members of the first conference represented twenty-six of the world's fifty-nine independent powers, and three-fourths of its population and resources; the two hundred and fifty-six members of the second conference represented forty-four of the world's fifty-seven powers claiming sovereignty, and practically all of its population and resources. But although the conferences may properly be called *world* assemblies, they lacked some essential features of a world *parliament* or legislature.

On the other hand, they possessed some striking features which may justify the appellation of the *federation* of the

world. The legislative, judicial, and executive organs of this federation are still rudimentary, of course, but they have come to life, thanks to the Peace Conferences, and give promise of larger growth. The twenty conventions and declarations adopted by the two conferences form a code of international law which is, in the aggregate, of large volume and great importance. The judicial organs of this federation are the Permanent Court of Arbitration, the Court of Arbitral Justice, and the International Prize Court; and, although the first of these is for purely voluntary resort and the second has not yet been put in operation, they together form a very respectable judiciary for the world federation, a much more respectable one than various other federations have had, and one that is strengthened by an admirable code of judicial procedure and by the obligatory submission to it of at least two important classes of cases, the collection of contractual debts and the adjudication of maritime prizes.

The chief defect of international law in the past has generally been considered to be its lack of an efficient executive. This defect has been largely supplied by the two Peace Conferences. The conventions are operative only upon those powers which have accepted them, but they can be discontinued only after formal notice to the other powers and at the end of one year after the date of such notice. The sanction for the faithful observance of the conventions, meanwhile, rests not only upon the good faith and public opinion of each nation, but upon an *international* public opinion which has been so largely developed by the conferences that it is almost a creation of their own. They have greatly strengthened this international public opinion by the personal intercourse of

the leaders of thought throughout the world; and they have greatly enlightened it by holding up in the clear, many-sided light of a world discussion the ideals of each nation, thus making each nation more fully conscious than ever before of its own ideals of international conduct and of those of all other nations. The potency of this strengthened and enlightened international public opinion has been illustrated many times in the pages of this book. Its force was acknowledged by such dissimilar men as Count Münster, of Germany, in the first conference, and M. Beernaert, of Belgium, in the second; it has been bowed to by many powers, ranging from the British Empire down to Venezuela.

This federation of the world is very far indeed from the ideal of a world empire, which was realized by Cæsar and attempted by Napoleon. It is also very far from the particularist ideal of absolute and isolated autonomy on the part of each nation, which has been found to be, both in the Orient and the Occident, as undesirable as it is impossible. The golden mean between these two extremes which this federation of the world has begun to represent, is well expressed by Professor de Martens, of Russia, in his closing address to the IV Commission of the second conference.

"If we deserve any credit," he said, and his statement was received with unanimous applause, "for the elaboration of approved projects, it is by grace only of the conviction which inspires all of us without exception that the days of an isolated life and of separation between the nations have passed away for ever, that nations must make mutual concessions to each other, and that only on this essential condition can the organization of the new international and common life become a great blessing to all. This, gentlemen, is the mistress idea of all our labors, and this is the keystone of the edifice of law

and justice whose corner stone we have recently laid. This idea will become in the future the solid guarantee of international peace, and, by leaving it as a heritage to our successors, we shall guarantee the success of their efforts towards the ideal which we have pursued."

The "edifice of law and justice," to which Professor de Martens referred, was the Peace Palace in The Hague. which Mr. Andrew Carnegie, of the United States, had presented, and whose corner-stone the second conference had laid. This palace, the seat of the international courts established by the conferences, is a tangible and beautiful expression of the ideal of the federation of the world, which they have done so much to realize. The chief public ceremony of the first conference, too, the honor accorded by the United States delegation to the memory of Hugo Grotius at Delft, was the exaltation of that international law and justice which must ever be the motive power and guidance of the federation of the world, and which the two Peace Conferences have done so much to develop.

II. THE THIRD PEACE CONFERENCE

The wholly unexpected manner in which the first conference was called into existence, and the large element of chance which entered into the summoning of the second, led the Interparliamentary Union and other influential organizations to demand that some regular means should be adopted by the second conference for the periodical assembly of its successors.

Secretary Root instructed the United States delegation of 1907 to "favor the adoption of a resolution by the conference providing for the holding of further

conferences within fixed periods and arranging the machinery by which such conferences may be called and the terms of the programme may be arranged, without awaiting any new and specific initiative on the part of the powers or any one of them." "Encouragement for such a course," Mr. Root added, "is to be found in the successful working of a similar arrangement for international conferences of the American Republics."

The United States delegation introduced a resolution in accordance with these instructions and suggested, as the date of the meeting of the third conference, the month of June, 1914. Although the great desirability of the object of this resolution was freely admitted, the conference seemed to fear that it implied, in some way, a wrong to the Czar of Russia, since he had taken the initiative in calling the first conference and in arranging its programme of work, and had played a large part in the same respects in relation to the second conference. When the resolution was presented in the sixth plenary session, delegation after delegation arose and expressed its gratitude to the Czar, as the initiator of both conferences, and to the Queen of the Netherlands, as their hostess. The delegation of the United States participated in this expression of gratitude, and made it plain that no wrong was intended to the Czar, but that the welfare of humanity should not be subordinated to diplomatic ceremonialism. The resolution, as finally adopted as one of the desires (*vœux*) of the Final Act was as follows:

"The conference recommends to the powers the reunion of a third Peace Conference, which shall take place within a period analogous to that which has elapsed since the preceding conference, at a date to be fixed by common agreement among the powers, and

it calls their attention to the necessity of preparing for the work of this third conference long enough in advance to insure the pursuit of its deliberations with the requisite authority and rapidity. To attain this end, the conference considers it very desirable that about two years before the probable date of the reunion a preparatory committee be charged by the governments with the duty of collecting the various propositions to be submitted to the conference, of investigating matters susceptible of future international regulation, and of preparing a programme to be approved by the governments soon enough to permit its serious study in each country. This committee shall also be charged with the duty of proposing a mode of organization and procedure for the conference itself."

The above resolution was voted unanimously and, despite its somewhat indefinite phraseology, it means that probably in the summer of 1915 a third International Peace Conference will assemble at The Hague, which shall in a similar manner provide for the meeting of its successor. It means, also, that about two years before that date the attention of every nation will be centered upon some great problems of international life, and that an ardent and careful, a thorough and enthusiastic, discussion of those problems and the best means of solving them will roll round the world, gaining enlightenment and power as it proceeds. And then, when the third conference assembles, it may be confidently expected that it will convert some of the attempts of the second conference into accomplished facts, even as the attempts of the first became the achievements of the second.

"The immediate results of such a conference," says our great American Secretary of State, Mr. Elihu Root,[1] "must always be limited to a small part of the field which

[1] In his instructions to the United States delegation to the second conference, and his letter to the President in regard to its work.

the more sanguine have hoped to see covered; but each successive conference will make the positions reached in the preceding conference its point of departure, and will bring to the consideration of further advances towards international agreement opinions affected by the acceptance and application of the previous agreements. Each conference will inevitably make further progress and, by successive steps, results may be accomplished which have formerly appeared impossible. . . . The most valuable result of the Conference of 1899 was that it made the work of the Conference of 1907 possible. The achievements of the two conferences justify the belief that the world has entered upon an orderly process through which, step by step, in successive conferences, each taking the work of its predecessor as its point of departure, there may be continual progress toward making the practice of civilized nations conform to their peaceful professions." With these wise words of warning and encouragement this account of the first two great Peace Conferences may fitly be brought to an end.

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